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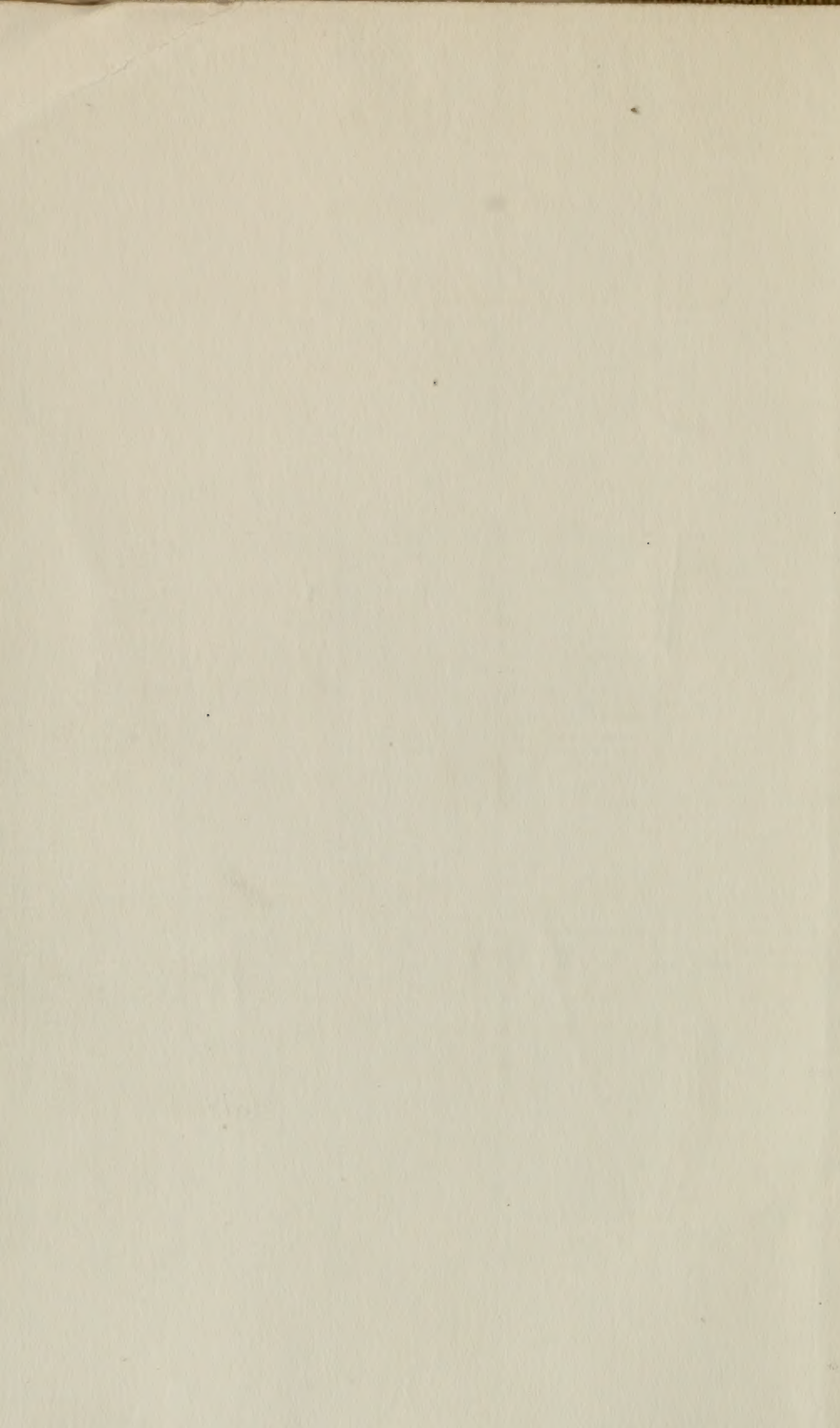
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United States
Circuit Court of Appeals
For the Ninth Circuit.

LANCASHIRE SHIPPING COMPANY, LIMITED, a Corporation,
Claimant of the British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and All Persons
Intervening for Their Interest Therein,

Appellant,

vs.

THE AMERICAN IMPORT COMPANY, a Corporation, TILLMAN
& BENDEL, a Corporation, JAMES L. DE FREMERY and
HENRI M. SUERMONDT, Copartners Doing Business Under
the Firm Name of JAS. DE FREMERY & CO., THE APOL-
LINARIS COMPANY, LIMITED, a Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and
for the Northern District of California.*

No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMAN & BENDEL, a Corporation,
JAMES L. DE FREMERY and HENRI
M. SUERMONDT, Copartners Doing Business
Under the Firm Name of JAS. DE
FREMERY & CO., THE APOLLINARIS
CO., LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIMITED,
a Corporation,

Claimant.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause
to be filed in the office of the clerk of the United
States Circuit Court of Appeals for the Ninth Circuit,
upon the appeal heretofore perfected in this
court, and include in said transcript the following
pleadings, proceedings and papers on file herein, to
wit:

2 *Lancashire Shipping Company, Limited, vs.*

1. All those papers required by section 1 of paragraph 1 of rule IV of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

2. All of the pleadings in said cause and the exhibits [1*] annexed thereto.

3. All the testimony and other proofs adduced in said cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence, and all exhibits introduced by either party. Said exhibits to be sent up as original exhibits.

4. The opinion and decision of the Court.

5. The final decree and notice of appeal.

6. The assignment of errors.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Claimant and Appellant.

Service of the within Praecipe for Apostles on Appeal and receipt of a copy is hereby admitted this 12th day of Jan., 1916.

WILLIAM DENMAN,

DENMAN & ARNOLD,

Proctors for Libelants.

[Endorsed]: Filed Jan. 12, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified apostles on Appeal.

Statement of Clerk, U. S. District Court.

PARTIES.

Libelants: The American Import Company, a Corporation, Tillman & Bendel, a Corporation; James L. De Fremery and Henri M. Suermondt, Copartners Doing Business Under the Firm Name of Jas. De Fremery & Co., and the Apollinaris Co., Ltd., a Corporation.

Respondent: The British Steamer "Skipton Castle," Her Engines, Tackle, etc.

Claimant: Lancashire Shipping Company, Limited, a Corporation.

PROCTORS:

Libelant: William Denman, Esq., and Messrs. Denman & Arnold.

Respondent and Claimant: Ira A. Campbell, Esq., and McCutchen, Olney & Willard. [3]

PROCEEDINGS.

1911.

May 2. Filed Libel for Damage to Cargo.

Issued Monition for the attachment of British steamer "Skipton Castle," etc., which Monition was afterwards, on May 5th, 1911, returned and filed with the following return of the U. S. Marshal endorsed thereon:

"I hereby certify and return that I received the within Moni-

4 *Lancashire Shipping Company, Limited, vs.*

tion on the 2d day of May, 1911, and under instructions from the proctor herein, I hereby return the same without making a seizure of the British steamer 'Skipton Castle,' herein described, for the reason that an Admiralty Stipulation was entered into and filed with the Clerk of the United States District Court in and for said District. San Francisco, Cal., May 5th, 1911.

C. T. ELLIOTT,

United States Marshal.

By Geo. H. Burnham,

Chief Office Deputy."

Filed Claim of Lancashire Shipping Company, Limited, a Corporation, to the British steamer "Skipton Castle," etc.

Filed Admiralty Stipulation for release of said British steamer "Skipton Castle," in accordance with stipulation of counsel this day filed herein, in the sum of \$8,000.00. [4]

May 13. Filed Depositions of Lambert Page and J. Nelson Craven, taken on behalf of respondent, before Francis Krull, United States Commissioner.

August 12. Filed Answer of Lancashire Shipping Company, Limited.

1913.

- March 3. Filed Depositions of S. N. Keame and Norman Watkins, taken on behalf of claimant, before Francis Krull, United States Commissioner.

1914.

- April 2. Filed Deposition of Joseph S. Anderson, on behalf of libelant, taken before Francis Krull, Esq., United States Commissioner.
16. Filed Deposition of William Baird, taken on behalf of respondent, before Francis Krull, Esq., United States Commissioner.

This cause this day came on for hearing in the District Court of the United States for the Northern District of California, First Division, at San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing, etc., the Court ordered that the cause stand submitted.

1915.

- April 3. Filed Opinion, fixing the liability on the "Skipton Castle" and referring the matter to U. S. Commissioner to ascertain amount of damage.

Filed one volume of Testimony taken in open court.

6 *Lancashire Shipping Company, Limited, vs.*

October 20. Filed Stipulation waiving reference
 to U. S. Commissioner for report
 on damage sustained. [5]

October 20. Filed Stipulation as to damages sus-
 tained by Libelants in above-enti-
 tled action.

 Filed Stipulation as to Interest on
 Stipulated damages.

 25. Filed Final Decree.

December 29. Filed Notice of Appeal.
1916.

January 6. Filed Supersedeas Bond on Appeal,
 in the aggregate sum of \$7,750.00
 (Cost \$250.00, Supersedeas \$7,-
 500.00).

 12. Filed Praecipe for Apostles on Ap-
 peal.

March 17. Filed Assignment of Errors.

 31. Filed Stipulation and Order as to
 Transmission of Original Exhib-
 its on Appeal. [6]

*In the District Court of the United States, in and
for the Northern District of California.*

IN ADMIRALTY—(No. 15,156).

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMANN & BENDEL, a Corporation,
JAMES L. DE FREMERY and HENRI
M. SUERMONDT, Copartners Doing Business
Under the Firm Name of JAS. DE
FREMERY CO., THE APOLLINARIS CO.,
LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents.

Libel by Colibelants for Damage and Loss of Cargo.

To the Honorable J. J. DE HAVEN, Judge of the
United States District Court, Northern District
of California, in Admiralty:

The libel of the American Import Company, a corporation, Tillmann & Bendel, a corporation, James L. de Fremery and Henri M. Saermondt, copartners doing business under the firm name of Jas. de Fremery & Co., and the Apollinaris Co., Ltd., a corporation, importers of goods and merchants, against the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, of which one J. Nel-

son Craven is master, and all persons intervening for their interest therein, in a cause of contract civil and maritime, alleges as follows:

I.

Claim No. 1 of the American Import Company.

The libelant, American Import Company, a corporation, is informed and believes, upon such information and belief alleges [7] that on or about the 17th day of December, 1910, H. C. Leutheuser shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, State of California, and to be delivered to said libelant at said port, the following-described goods, to wit: Seven hundred and forty-four (744) packages of merchandise, the said goods then being in good order and well conditioned and to be delivered to said libelant in like good order and condition, and the said captain received the said goods on board the said steamer and agreed to carry the same in the said manner and condition and as a common carrier thereof, to the said port of San Francisco, that the said steamer was a common carrier of goods by sea, and that she carried the said goods on the said voyage as a common carrier.

II.

That the said steamer did steam on the said voyage, via the Straits of Magellan, and that thereafter she did arrive at the port of San Francisco and did deliver to libelant the said cargo, but not in like good order and condition as when delivered to and

received by said steamer, but, on the contrary, in bad order and condition, seriously damaged by water, which damage was inflicted upon said cargo while in possession of said steamer on the said voyage.

III.

That the injury to the said merchandise inflicted on the said voyage amounts to more than Twenty-one Hundred and Eighty Dollars (\$2,180), and that said libelant has been damaged in said sum by the said failure to carry out the said contract as hereinabove described.

IV.

That the said steamer "Skipton Castle" is now within the port of San Francisco, Northern District of California. [8]

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

I.

Claim No. 2 of the American Import Company.

The libelant, American Import Company, a corporation, is informed and believes, and upon such information and belief alleges that on or about the 17th day of December, 1910, H. C. Leutheuser shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Pedro, California, and to be delivered to libelant at the said port, the following described goods, to

wit: Three hundred and ninety (390) packages of merchandise, the said goods then being in good order and well-conditioned and to be delivered to said libelant in like good order and condition, and the said captain received the said goods on board the said steamer and agreed to carry the same in the said manner and condition and as a common carrier thereof, to the said port of San Pedro; that the said steamer was a common carrier of goods by sea, and that she carried the said goods on the said voyage as a common carrier.

II.

That the said steamer did steam on the said voyage, via the Straits of Magellan, and that thereafter she did arrive at the port of San Francisco and did deliver to libelant the said cargo, but not in like good order and condition as when delivered to and received by said steamer, but, on the contrary, in bad order and condition, seriously damaged by water, which damage was inflicted upon said cargo while in possession of said steamer on the said voyage.

III.

That the injury to the said merchandise inflicted on [9] the said voyage amounts to more than Sixteen Hundred and Nineteen and 08/100 Dollars (\$1,619.08), and that libelant has been damaged in the said sum by said failure to carry out the said contract as hereinabove described;

IV.

That the said steamer "Skipton Castle" is now

within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

I.

Claim of Tillmann & Bendel.

The libelant, Tillmann & Bendel, a corporation, is informed and believes and upon such information and belief alleges, that on or about the 17th day of December, 1910, Aachner Thermat Wasser Kaiser Brunnen Actien Desellschaft shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, California, and to be delivered to said libelant at the said port, the following described goods, to wit: Seventy-five (75) cases of mineral water, the said merchandise then being in good order and well-conditioned and to be delivered to said libelant in like good order and condition, and the said captain received the said goods on board the said steamer and agreed to carry the same in the said manner and condition and as a common carrier thereof, to the said port of San Francisco; that the said steamer was a common carrier of goods by sea, and that she carried the said goods on the said voyage as a common carrier.

II.

That the said steamer did steam on the said voy-

age, via the Straits of Magellan, and that thereafter she did arrive at [10] the port of San Francisco and did deliver to libelant the said cargo, but not in like good order and condition as when delivered to and received by said steamer, but, on the contrary, in bad order and condition, seriously damaged by water, which damage was inflicted upon said cargo while in possession of said steamer on the said voyage.

III.

That the injury to the said merchandise inflicted on the said voyage amounts to more than Two Hundred and Seventy-five Dollars (\$275), and that said libelant has been damaged in said sum by said failure to carry out the said contract as hereinabove described.

IV.

That the said steamer "Skipton Castle" is now within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Court.

I.

Claim of James L. de Fremery and Henri M. Suermondt.

The libelants, James L. de Fremery and Henri M. Suermondt, copartners doing business under the firm name of Jas. de Fremery & Co., are informed and believe, and upon such information and belief

allege, that on or about the 17th day of December, 1910, Rene Robert shipped on board the said "Skip-ton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, California, and to be delivered to said libelants at the said port, the following described goods, to wit: Three hundred and twelve (312) cases cases of Vichy Water, the said goods then being in good order and well conditioned and to be delivered to said libelants in like good order [11] and condition, and the said captain received the said goods on board the said steamer and agreed to carry the same in the said manner and condition and as a common carrier thereof, to the said port of San Francisco; that the said steamer was a common carrier of goods by sea, and that she carried the said goods on the said voyage as a common carrier.

II.

That the said steamer did steam on the said voyage, via. the Straits of Magellan, and that thereafter she did arrive at the port of San Francisco and did deliver to libelants the said cargo but not in like good order and condition as when delivered to and received by said steamer, but, on the contrary, in bad order and condition, seriously damaged by water, which damage was inflicted upon said cargo while in possession of said steamer on the said voyage.

III.

That the injury to said merchandise inflicted on the said voyage amounts to more than Six Hundred and Two and 16/100 Dollars (\$602.16), and that libel-

ants have been damaged in the said sum by said failure to carry out the said contract as hereinabove set forth.

IV.

That the said steamer "Skipton Castle" is now within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

I.

The Claim of the Apollinaris Co., Ltd.

The libelant, the Apollinaris Co., Ltd., a corporation, [12] is informed and believes, and upon such information and belief alleges, that on or about the 17th day of December, 1910, the Apollinaris Co., Ltd., shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, California, and to be delivered to said libelant at the said port, the following described goods, to wit: Five hundred and fifty (550) cases of Apollinaris Water, Twenty-five (25) cases of Apenta Water, the said goods then being in good order and well-conditioned and to be delivered to said libelant in like good order and condition, and the said captain received the said goods on board the said steamer and agreed to carry the same in the said manner and condition and as a common carrier thereof, to the said port of San Francisco; that the said steamer was a common carrier of goods by sea, and

that she carried the said goods on the said voyage as a common carrier.

II.

That said steamer did steam on the said voyage, via. the straits of Magellan, and that thereafter she did arrive at the port of San Francisco and did deliver to said libelant said cargo, but not in like good order and condition as when delivered to and received by said steamer, but, on the contrary, the said cases of Apollinaris Water when delivered to said libelant at said port of San Francisco, were badly damaged by breakage and leakage of the said bottles, due to the bad stowage of the said cargo and the unseaworthiness of the said steamer, which damage was inflicted upon the said goods while in possession of said steamer on the said voyage.

III.

That the injury to the said merchandise inflicted on the said voyage amounts to more than Sixteen Hundred and Seventy-five and 68/100 (\$1,675.68), and that said libelant has [13] been damaged in said sum by said failure to carry out the said contract as hereinabove described.

IV.

That the said steamer "Skipton Castle" is now within the port of San Francisco, Northern District of California.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

WHEREFORE libelants pray that process in due

form of law, according to the course of this court in causes of admiralty and maritime jurisdiction may issue against the said steamer, her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of damages and each claim as aforesaid, with costs, and that the said steamer may be condemned and sold to pay the same, and that the libelants may have such other and further relief in the premises as in law and justice they may be entitled to.

WILLIAM DENMAN,

Proctor for Libelants.

Verification of the above libel is hereby waived.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Proctors for Owner and Claimant of the said
Steamer "Skipton Castle."

[Endorsed]: Filed May 2, 1911. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [14]

*In the District Court of the United States, in and for
the Northern District of California.*

(No. 15,156.)

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMANN & BENDEL, a Corporation,
JAMES L. DE FREMERY and
HENRI M. SUERMONDT, Copartners Doing
Business Under the Firm Name of JAS.
DE FREMERY & CO., THE APOLLINARIS
CO., LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents.

Answer of Lancashire Shipping Company, Limited.

The answer of the Lancashire Shipping Company, Limited, a corporation, claimant of said respondent "Skipton Castle," to the libel of the American Import Company, one of the libelants herein, admits, denies and alleges as follows, to wit:

I.

Claimant admits that libelant, American Import Company, is a corporation, and admits that, on or about the 17th day of December, 1910, H. C. Leutheuser shipped on board said steamship "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in said steamship to

the port of San Francisco, State of California, and to be delivered to said [15] libelant at said port, seven hundred and forty-four (744) packages of merchandise; claimant has no knowledge or information as to the actual condition of the contents of said packages, and upon that ground denies that the contents of said packages were then in good order and condition, but admits that the exterior of said packages appeared to be in apparent good order and condition, and admits that said packages were to be delivered to said libelant in like apparent good order and condition; admits that said captain received said goods on board said steamer and agreed to carry them, in said apparent good order and condition and as a common carrier thereof, to said port of San Francisco; admits that said steamer was a common carrier of goods by sea, and that she carried the said goods on said voyage as a common carrier.

II.

Claimant admits that said steamer steamed on said voyage via the Straits of Magellan, and that thereafter she arrived at the port of San Francisco and delivered said cargo to libelant; but denies that all of said goods were not delivered in as good order and condition as when received by said steamer, and denies that all of said goods were delivered in bad order and condition; but admits that a portion of said goods were not delivered in apparent good order and condition as when received by said steamship, and that on the contrary a portion of said goods were delivered in bad order and condition; admits that said damage was inflicted upon said cargo while in the

possession of said steamer on said voyage; claimant denies, however, that said goods were damages by water. [16]

III.

Claimant alleges that it has no knowledge or information as to the extent of said damage to said merchandise, and placing its denial upon that ground, denies that the damage to said merchandise amounts to more than the sum of Two Thousand One Hundred and Eighty (\$2,180) Dollars. Claimant further denies, upon the same grounds, that said libelant has been damaged in said sum, or any sum, by the failure of said vessel to carry out said contract thereinbefore described in said libel, and for that reason requires that strict proof be made of said damage and of each and every item thereof.

IV.

Claimant admits that the steamer "Skipton Castle" was within the port of San Francisco, in the Northern District of California, on the date of the filing of said libel.

V.

Claimant denies that, all and singular, the premises of said libel are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

VI.

Further answering unto the said libel, claimant alleges:

That, at the time of the shipment of said goods on board said steamship "Skipton Castle," at the port of Antwerp, Belgium, on or about the 17th day of

December, 1910, for transportation to the port of San Francisco, said packages were shipped under bills of lading which acknowledged the receipt of said goods in apparent good order and condition, and stipulated that the quality, [17] contents and value of said packages were unknown.

That by the terms and conditions of said bills of lading under which said goods were shipped, it was further provided, among other things, that the ship “should not be liable for loss or damage occasioned by the act of God, * * * sweating, * * * decay, or the indirect causes thereof, contact with, or smell or evaporation from, other goods, * * * injury to wrappers, however causes, * * * heat * * * at any time or in any place, * * * or any other perils of the sea; the negligence, default or error in judgment of the master, pilot, mariners, engineers, stevedores or other persons employed in or about the ship.”

That, at the time of the receipt of said goods on board said steamship, and at the time of the sailing of said steamship upon said voyage, claimant and its officers and agents had exercised due diligence to make said steamship in all respects seaworthy, and to properly man, equip and supply her; that said goods were properly loaded and stowed, and that during all the times of said loading and upon said voyage were properly protected, cared for and ventilated; that claimant is informed and believes, and upon such information and belief alleges, that said damage to said goods was due to decay and the indirect causes thereof resulting from the inherent

vice of said goods, in that the willow of which they were made was green at the time of shipment, and, thereby, subject to such decay during the course of said voyage; that if said damage resulted from any other causes than said inherent vice, such decay was caused by the heat extraneous to said goods, and the natural heat of the compartment in which said goods were stowed, as is customarily found in the cargo compartments of all steel cargo-carrying steamships, and to sweat and the evaporation from other goods; that a large part of said damage [18] was to the wrappers in which said goods were packed, the exact extent of which is unknown, and of which claimant demands that strict proof be made; but all such decay, heat, sweat, evaporation from other goods, and damage to said wrappers, was entirely without any fault or negligence on the part of said steamship, her master, officers or crew, or this claimant or any of the agents or employees thereof, and that all of said causes of such damage are within the exemptions contained in said bills of lading, to which bills of lading reference is hereby made, and the same are hereby made a part of this answer with the same force and effect as though they were herein set forth at length.

VII.

That claimant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

VIII.

That all and singular the premises set forth in this answer are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering unto the allegations of the second claim of said American Import Company, claimant admits, denies and alleges as follows:

I.

Claimant admits that, on or about the 17th day of December, 1910, H. C. Leutheuser shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Pedro, California, [19] to be delivered to libelant at the said port, the following described goods, to wit, three hundred and ninety (390) packages of merchandise; claimant has no knowledge or information as to the actual condition of the contents of said packages, and upon that ground denies that the contents of said packages were then in good order and condition; but admits that the exterior of said packages appeared to be in apparent good order and condition; admits that said captain received the goods on board the said steamer and agreed to carry the same, in said apparent good order and condition and as a common carrier thereof, to said port of San Pedro; that said steamer was a common carrier of goods by sea, and that she carried said goods on said voyage as a common carrier.

II.

Claimant admits that the said steamer steamed on said voyage, via the Straits of Magellan, and that thereafter she arrived at the port of San Pedro and delivered to libelant the said cargo; but denies that all of said goods were not delivered in as goods order and condition as when received by the said steamer, and denies that all of said goods were delivered in

bad order and condition; admits that said damage was inflicted upon said cargo while in the possession of said steamer on said voyage; claimant denies, however, that said goods were damaged by water.

III.

Claimant alleges that it has no knowledge or information as to the extent of said damage to said merchandise and, placing its denial upon that ground, denies that the damage to said merchandise amounts to more than One Thousand Six Hundred and Nineteen and 8/100 (\$1,619.08) Dollars; claimant further denies, upon the same grounds, that said libelant has been damaged in said sum, or any sum, by the failure of said vessel to carry out [20] said contract thereinbefore described in said libel, and for that reason requires that strict proof be made of said damage and each and every item thereof.

IV.

Claimant admits that the steamer "Skipton Castle" was within the port of San Francisco, in the Northern District of California, on the date of the filing of said libel.

V.

Claimant denies that all and singular the premises of said libel are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

VI.

Further answering unto the said libel, claimant alleges:

That, at the time of the shipment of said goods on board said steamship "Skipton Castle" at the port of

Antwerp, Belgium, on or about the 17th day of December, 1910, for transportation to the port of San Pedro, said packages were shipped under bills of lading which acknowledged the receipt of said goods in apparent good order and condition, and stipulated that the quality, contents and value of said packages were unknown.

That, by the terms and conditions of said bills of lading under which said goods were shipped, it was further provided, among other things, that the ship "should not be liable for loss or damage occasioned by the act of God, * * * sweating, * * * decay, or the indirect causes thereof, contact with, or smell or evaporation from, other goods, * * * injury to wrappers, however causes, * * * heat * * * at any time or in any place, * * * or any other perils of the [21] sea; the negligence, default or error in judgment of the master, pilot, mariners, engineers, stevedores, or other persons employed in or about the ship."

That, at the time of the receipt of said goods on board said steamship, and at the time of the sailing of said steamship upon said voyage, claimant and its officers and agents had exercised due diligence to make said steamship in all respects seaworthy, and to properly man, equip and supply her; that said goods were properly loaded and upon said voyage were properly protected, cared for and ventilated; that claimant is informed and *believe*, and upon such information and belief alleges, that said damage to said goods was due to decay and the indirect causes thereof resulting from the inherent vice of said

goods, in that the willow of which they were made was green at the time of shipment and, thereby, subject to such decay during the course of said voyage; that if said damage resulted from any other causes than said inherent vice, such decay was caused by the heat extraneous to said goods, and the natural heat of the compartment in which said goods were stowed, as is customarily found in the cargo compartments of all steel cargo-carrying steamships, and to sweat and the evaporation from other goods; that a large part of said damage was to the wrappers in which said goods were packed, the exact extent of which is unknown, and of which claimant demands that strict proof be made; but all such decay, heat, sweat, evaporation from other goods, and damage to said wrappers, was entirely without any fault or negligence on the part of said steamship, her master, officers or crew, or this claimant or any of the agents or employees thereof, and that all of said causes of such damage are within the exemptions contained in said bills of lading, [22] to which bills of lading reference is hereby made, and the same are hereby made a part of this answer with the same force and effect as though they were herein set forth at length.

VII.

That claimant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

VIII.

That all and singular the premises set forth in this answer are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering unto the libel of Tillman & Bendel, a corporation, one of the libelants herein, claimant admits, denies and alleges as follows:

I.

Claimant admits that libelant Tillman & Bendel is a corporation, and that on or about the 17th day of December, 1910, Aachner Thermal Wasser Kaiser Brunnen Atkien Gesellschaft shipped on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in said steamer to the port of San Francisco, and to be delivered to said libelant at the said port, the following described goods, to wit, seventy-five (75) cases of mineral water; claimant has no knowledge or information as to the actual condition of the contents of said cases of mineral water, and upon that ground denies that the contents of said cases were in good order and well-conditioned, but admits that the exterior of said packages appeared to be in good order and condition; admits that [23] said packages were to be delivered to said libelant in like apparent good order and condition; admits that the captain received the said goods on board the said steamer and agreed to carry the same in said apparent good order and condition, as a common carrier thereof, to said port of San Francisco; admits that the said steamer was a common carrier of goods by sea, and that she carried the said goods on said voyage as a common carrier.

II.

Claimant admits that said steamer did steam on said voyage, via the Straits of Magellan, and that

thereafter she did arrive at the port of San Francisco and did deliver to libelant the said cargo, but denies that all of said cargo was not delivered in as good order and condition as when received by said steamer, and denies that all of said cargo was delivered in bad order and condition; but admits that a portion of said cargo was delivered in bad order and condition, and that a portion of said damage to said cargo occurred while in the possession of said steamer on said voyage; denies that said damage was caused by water, other than the water contained in said bottles, as hereinafter set forth.

III.

Claimant alleges that it has no knowledge or information as to the extent of said damage to said merchandise and, placing its denial upon that ground, denies that the said damage to said merchandise amounted to more than the sum of Two Hundred and Seventy-five (\$275) Dollars; claimant further [24] denies, upon the same ground, that said libelant has been damaged in the said sum, or any sum, by the failure of said vessel to carry out the said contract thereinbefore described in said libel, and for that reason requires that strict proof be made of said damage and each and every item thereof.

IV.

Claimant admits that the steamer "Skipton Castle" was within the port of San Francisco, in the Northern District of California, on the date of the filing of said libel.

V.

Claimant denies that, all and singular, the premises

of said libel are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

VI.

Further answering unto said libel, claimant alleges :

That at the time of the shipment of said mineral water on board said steamship "Skipton Castle" at the port of Antwerp, Belgium, on or about the 17th day of December, 1910, for transportation to the port of San Francisco, said cases of mineral water were shipped under bills of lading which acknowledged the receipt of said mineral water in apparent good order and condition, and stipulated that the quality, contents and value of said packages were unknown; that by the terms and conditions of said bill of lading under which said goods were shipped, it was provided further, among other things, that the said ship " should not be liable for loss or damage occasioned by the act of God, * * * insufficiency of packages in size, strength, or otherwise, leakage, breakage, wastage, * * * [25] or the indirect causes thereof, injury to wrappers, however causes, * * * heat * * * at any time or place * * * or any other perils of the sea * * * the negligence, default or error in judgment of the master, pilot, mariners, engineers, stevedores or other persons employed in or about the ship."

That the time of the receipt of said mineral water on board said steamship and at the time of the sailing of said steamship upon said voyage, claimant and its officers and agents had exercised due dili-

gence to make said steamship in all respects seaworthy, and to properly man, equip and supply her; that said mineral water was properly loaded and stowed and was, during all the times of said loading and upon said voyage, properly protected, cared for and ventilated; that plaintiff is informed and believes and, upon such information and belief alleges, that said mineral water was placed in bottles at low temperature, which caused said mineral water to absorb the gas with which it was charged, and the bottles in which the said mineral water was contained were not of sufficient strength and shape to withstand the pressure upon said bottles by said gas, upon the same being thrown off by said mineral water when said bottles were subjected to the natural and usual heat of the cargo compartment of said vessel in which said bottles were stowed, and that, by reason thereof, many of said bottles burst and the contents thereof—said mineral water—was precipitated upon said cases and the wrappers of said bottles, damaging the same; that if said damage resulted from any other than the aforesaid causes, it was due to leakage and wastage of said mineral water, breakage of bottles, and heat extraneous to said bottles, and perils of the sea, to wit, the natural heat of the cargo compartment [26] of said vessel in which said mineral water was stowed; and that all such leakage and wastage of said mineral water, and breakage of said bottles, and heat, and damage to said wrappers and labels on said bottles, was entirely without any fault or negligence on the part of said steamship or her master, officers or crew, or this

claimant, or any of the agents or employees thereof; and that all of said causes of damage are within the exemption contained in said bill of lading, to which bill of lading reference is hereby made, and the same is hereby made a part of this answer with the same force and effect as though the same were herein set forth at length.

VII.

That claimant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

VIII.

That all and singular the premises set forth in this answer are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering unto the allegations of the libel of James L. de Fremery and Henri M. Suermond, claimant, admits, denies and alleges as follows, to wit:

I.

Claimant admits that the libelants, James L. de Fremery and Henri M. Suermond are copartners doing business under the firm name of James de Fremery & Co., and that, on or about the 17th day of December, 1910, Rene Robert shipped [27] on board the said "Skipton Castle," then lying in the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, and to be delivered to said libelants at the said port, the following described goods, to wit: three hundred and twelve (312) cases of Vichy Water;

claimant has no knowledge or information as to the actual condition of the contents of said cases of Vichy Water, and upon that ground denies that the contents of said cases were in good order and well-conditioned; but admits that the exterior of said packages appeared to be in good order and condition; admits that said packages were to be delivered to said libelant in like apparent good order and condition; admits that the captain received said goods on board the said steamer, and agreed to carry the same, in said apparent good order and condition and as a common carrier thereof, to the port of San Francisco; admits that the said steamer was a common carrier of goods by sea and that she carried the said goods on said voyage as a common carrier.

II.

Claimant admits that said steamer did sail on said voyage, via the Straits of Magellan, and that thereafter she did arrive at the port of San Francisco, and did deliver to libelants the said cargo, but denies that all of said cargo was not delivered in as good order and condition as when received by said steamer; denies that all of said cargo was delivered in bad order and condition, but admits that a portion of said cargo was delivered in bad order and condition, and that a portion of said damage to said cargo occurred while in possession of said steamer on said voyage; denies that [28] said damage was caused by water other than the water contained in said bottles, as hereinafter set forth.

II.

Claimant alleges that it has no knowledge or in-

formation as to the extent of said damage to said merchandise, and placing its denial upon that ground, denies that said damage to said merchandise amounted to more than the sum of Six Hundred and Twelve and 16/100 (\$612.16) Dollars; claimant further denies, upon the same ground, that said libelants have been damaged in the said sum, or any sum, by the failure of said vessel to carry out the said contract thereinbefore described, and for that reason requires that strict proof be made of said damage and each and every item thereof.

IV.

Claimant admits that the steamer "Skipton Castle" was within the port of San Francisco, in the Northern District of California, on the date of the filing of said libel.

V.

Claimant denies that, all and singular, the premises of said libel are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

VI.

Further answering unto the said libel, claimant alleges:

That at the time of the shipment of said Vichy Water, on board said steamship "Skipton Castle," at the port of Antwerp, [29] Belgium, on or about the 17th day of December, 1910, for transportation to the port of San Francisco; said cases of Vichy Water were shipped under a bill of lading which acknowledged the receipt of said packages in apparent good order and condition, and stipulated

that the quality, contents and value of said packages were unknown; that by the terms and conditions of said bill of lading under which said goods were shipped, it was further provided, among other things, that the said ship "should not be liable for loss or damage occasioned by the act of God, * * * insufficiency of packages in size, strength, or otherwise; leakage, breakage, wastage, * * * or the indirect causes thereof, injury to wrappers, however causes, * * * heat * * * at any time or place * * * or any other perils of the sea, * * * the negligence, default or error in judgment of the master, pilot, mariners, engineers, stevedores or other persons employed in or about the ship."

That at the time of the receipt of said Vichy Water on board said steamship, and at the time of the sailing of said steamship on said voyage, claimant and its officers and agents had exercised due diligence to make said steamship in all respects seaworthy, and to properly man, equip and supply her, and that said Vichy Water was properly loaded and stowed and was, during all the times of said loading and upon said voyage, properly protected, cared for and ventilated; that plaintiff is informed and believes and, upon such information and belief alleges, that said Vichy Water was placed in bottles at low temperature, which caused said Vichy Water to absorb the gas with which it was charged and the bottles in which the said Vichy Water was contained were not of sufficient strength and shape to withstand the pressure upon said bottles by said gas, upon the same

being thrown off by said mineral water when said bottles were [30] subjected to the natural and usual heat of the cargo compartment of said vessel in which said bottles were stowed, and that, by reason thereof, many of said bottles burst and the contents thereof—said Vichy Water—*was* precipitated upon said cases and the wrappers of said bottles, damaging the same; that if said damage resulted from any other than the aforesaid causes, it was due to leakage and wastage of said mineral water, breakage of bottles, and heat extraneous to said bottles, and perils of the sea, to wit, the natural heat of the cargo compartment of said vessel in which said Vichy Water was stowed; and that all such leakage and wastage of said Vichy Water, and breakage of said bottles, and heat, and damage to said wrappers and labels on said bottles, *was* entirely without any fault or negligence on the part of said steamship or her master, officers or crew or this claimant, or of any of the agents, or employees thereof; and that all of said causes or damage are within the exceptions contained in said bill of lading, to which bill of lading reference is hereby made, and the same is hereby made a part of this answer with the same force and effect as though the same were herein set forth at length.

VII.

That claimant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

VIII.

That all and singular the premises set forth in this

answer are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court. [31]

Further answering unto the libel of The Apollinaris Co., Ltd., a corporation, one of the libelants herein, claimant admits, denies and alleges as follows, to wit:

I.

Claimant admits that libelant, The Apollinaris Co., Ltd., is a corporation, and that on or about the 17th day of December, 1910, The Apollinaris Co., Ltd., shipped on board the said "Skipton Castle," then lying at the port of Antwerp, Belgium, to be carried and transported in the said steamer to the port of San Francisco, California, and to be delivered to libelant at the said port, the following described goods, to wit, five hundred and fifty (550) cases of Apollinaris Water and twenty-five (25) cases of Apenta Water; claimant has no knowledge or information as to the actual condition of the contents of said cases of water, and upon that ground denies that the contents of said cases were in good order and well *cindition*, but admits that the exterior of said cases appeared to be in good order and condition; admits that said cases were to be delivered to said libelant in like apparent good order and condition; admits that the captain received the said goods on board the said steamer and agreed to carry the same, in said apparent good order and condition, and as a common carrier thereof, to said port of San Francisco; admits that the said steamer was a common carrier of goods by sea, and that she carried the

said goods on said voyage as a common carrier.

II.

Claimant admits that said steamer did sail on said voyage, via the Straits of Magellan, and that thereafter [32] she *die* arrive at the port of San Francisco, and did deliver to libelant said cargo, but denies that all of said cargo was not delivered in as good order and condition as when received by said steamer, and denies that all of said cases of Apollinaris Water were delivered to said libelant at the port of San Francisco, damaged by breakage and leakage of said bottles; but admits that a portion of said cases of Apollinaris Water were delivered to said libelant at said port of San Francisco, damaged by breakage and leakage of said bottles, and that a portion of said damage was inflicted upon said goods while in the possession of said steamer on said voyage; claimant denies that said damage by breakage and leakage, or leakage, or otherwise, was due to bad stowage of said cargo, and the unseaworthiness, or unseaworthiness, of said steamer.

III.

Claimant alleges that it has no knowledge or information as to extent of said damage to said merchandise and, placing its denial upon that ground, denies that the said damage to said merchandise amounted to more than the sum of One Thousand Six Hundred and Seventy-five and 68/100 (\$1,675.-68) Dollars; claimant further denies, upon the same ground, that said libelant has been damaged in the said sum, or any sum, by the failure of said vessel to carry out the said contract thereinbefore described

in said libel, and for that reason required that strict poof be made of said damage and each and every item thereof.

IV.

Claimant admits that the steamer "Skipton Castle," was within the port of San Francisco, in the Northern District of [33] California, on the date of the filing of said libel.

V.

Claimant denies that, all and singular, the premises of said libel are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

VI.

Further answering unto the said libel, claimant alleges:

That at the time of the shipment of said Apollinaris Water on board said steamship "Skipton Castle," at the port of Antwerp, Belgium, on or about the 17th day of December, 1910, for transportation to the port of San Francisco, said cases of Apollinaris Water were shipped under a bill of lading which acknowledged the receipt of said packages in apparent good order and condition, and stipulated that the quality, contents and value of said packages were unknown; that by the terms and conditions of said bill of lading under which said goods were shipped, it was further provided, among other things, that the said ship "should not be liable for loss or damage occasioned by the act of God, * * * insufficiency of packages in size, strength, or otherwise; leakage, breakage, wastage, * * * or the indirect causes

thereof, injury to wrappers, however caused, * * * heat * * * at any time or place * * * or any other perils of the sea, * * * the negligence, default, or error in judgment of the master, pilot, mariners, engineers, stevedores or other persons employed in or about the ship.”

That at the time of the receipt of said Apollinaris Water on board said steamship, and at the time of the sailing [34] of said steamship on said voyage, claimant and its officers and agents had exercised due diligence to make said steamship in all respects seaworthy, and to properly man, equip and supply her, and that said Apollinaris Water was properly loaded and stowed and was, during all the time of said loading and upon said voyage, properly protected, cared for and ventilated; that plaintiff is informed and believes and, upon such information and belief alleges, that said Apollinaris Water was placed in bottles at *lot* temperature, which caused said Apollinaris Water to absorb the gas with which it was charged and the bottles in which the said Apollinaris Water was contained were not of sufficient strength and shape to withstand the pressure upon said bottles by said gas, upon the same being thrown off by said mineral water when said bottles were subjected to the natural and usual heat of the cargo compartment of said vessel in which said bottles were stowed, and that, by reason thereof, many of said bottles burst and the contents thereof—said Apollinaris Water—was precipitated upon said cases and the wrappers of said bottles, damaging the same; that if said damage resulted from any other than the aforesaid causes, it was due

to leakage and wastage of said mineral water, breakage of bottles, and heat extraneous to said bottles, and perils of the sea, to wit, the natural heat of the cargo compartment of said vessel in which said Apollinaris Water was stowed; and that all such leakage and wastage of said Apollinaris Water, and breakage of said bottles, and heat, and damage to said wrappers and labels on said bottles, was entirely without any fault or negligence on the part of said steamship or her master, officers or crew, or this claimant, or of any of the agents or employees thereof; and that all of said causes of damage are [35] within the exceptions contained in said bill of lading, to which bill of lading reference is hereby made, and the same is hereby made a part of this answer with the same force and effect as though the same were herein set forth at length.

VII.

That claimant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

VIII.

That all and singular the premises set forth in this answer are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, claimant prays that the libels herein, and each of them, may be dismissed, and that it may have judgment against said libelants, and each of them, for the costs and disbursements incurred herein; and for such other and further relief as may

be *deemed and* equitable in the premises.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Claimant. [36]

State of California,
City and County of San Francisco,—ss.

Ira A. Campbell, being first duly sworn, on oath deposes and says:

That he is one of the proctors for the above-named claimant, Lancashire Shipping Company, Limited, and that, as such proctor, he makes this verification for and on behalf of said claimant for the reason that none of the officers of said claimant are within the jurisdiction of this court and able to make this verification in person; that he has read the foregoing answer, knows the contents thereof, and that the same is true, except as to those matters which are stated on his information or belief, and as to those matters, that he believes it to be true.

IRA A. CAMPBELL.

Subscribed and sworn to before me this 11 day of August, A. D. 1911.

[Seal] HENRY P. TRICOU,
Notary Public in and for the city and county of San
Francisco, State of California.

[Endorsed]: Filed Aug. 12, 1911. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [37]

[Opening Statement by Counsel for Libelant.]

*In the District Court of the United States in and for
the Northern District of California, First
Division.*

Hon. MAURICE T. DOOLING, Judge.

(No. 15,156.)

THE AMERICAN IMPORT COMPANY, et al.,
Libelants,

vs.

The British Steamer "SKIPTON CASTLE,"
Her Engines, etc.,

Respondent.

(TESTIMONY TAKEN IN OPEN COURT.)

Thursday, April 16, 1914.

Counsel Appearing:

WILLIAM DENMAN, Esq., for the Libelants.

IRA A. CAMPBELL, Esq., for the Respondent.

The COURT.—Who has the laboring oar in this matter?

Mr. DENMAN.—We having made a *prima facie* case the burden of proof is on the claimant. However, I will state the case, so that your Honor may understand the issues.

The steamer "Skipton Castle" loading at Antwerp for San Francisco via Magellan, took on various parcels of freight, of cargo, a number of parcels for San Francisco and San Pedro being stowed in No. 1 hold, the first hold in the ship as you come aft. Along with these parcels of freight was stowed a large shipment of animal fertilizer, bone-meal. Two days after they

were out of Hull—they came from Antwerp to Hull—they took their first temperature, which is ordinarily a daily occurrence on steamers of that character. They took their first temperature, or made the first record of the temperature in the log-book, showing that the temperature of this particular hold in which this fertilizer was [38] stowed with the shipment of cargo for San Francisco was about 50 degrees higher than the outside air, and 20 degrees higher than that in the adjoining hold. Daily records of temperature continued to be taken, showing a gradual climbing of the temperature of the hold until it reached in the log the temperature of 110 as the mean; how much higher or lower than that the extremes were on those dates we do not know, but the mean temperature recorded in the log-book was 110, and that was 25 or 30 degrees higher than the temperature in the hold immediately adjoining it, and that the outside temperature ranged from 50 to 60 degrees lower—that is, there was a difference of 50 or 60 degrees between the outside temperature and the temperature in that hold, and a difference of 20 or 25 degrees from the temperature in the other holds in the ship. When the cargo arrived here it was discovered that a large shipment of Apolinaris and Kaiser Water, both carbonated mineral waters, and coming from different places and bottled in different bottles had exploded; that is a very large percentage of the bottles had exploded and on the remainder of the bottles the casings and wrappings were covered with sweat, so that they were practically destroyed; that is, the casings and metal tops and the wrappings

were destroyed. The bills of lading did not except or contain any provision exempting the ship from the warranty of seaworthiness, and we have pleaded the injury to the cargo and the answer admits that certain injury was inflicted and sets up certain affirmative defenses which will no doubt be explained by my opponent. In order that your Honor may start out knowing what our position is exactly I will refer your Honor to these three cases which will control our contention :

The *Carib*, 170 U. S. 655;

The *Caledonia*, 157 U. S. 124;

The *Southwark*, 191 U. S. 1. [39]

Briefly these cases hold that where there is no exception of unseaworthiness in the bill of lading that a latent unseaworthiness will render the ship liable, even since the passage of the Harter Act. Second, that a vessel to be seaworthy must be *seaworth* as to the temperature of her holds; that is to say, seaworthiness does not merely consist of keeping the hull tight but for certain kinds of cargo such as mineral water or beef or anything requiring unusual care when put on board, the ship must have her holds seaworthy for that class of cargo. That is held in the *Southwark* case, which is a beef case; a failure of a supply of ammonia for the cooling plant was held to be unseaworthiness. These cases really control our case and will come in response to the affirmative defenses of my opponent.

Mr. CAMPBELL.—We contend of course that there is no unseaworthiness on the part of the vessel and at this moment I am as much in the dark as I

have ever been as to what the contention of unseaworthiness is based upon by counsel. We contend that the cargo was stowed as customary, properly stowed. The damage to the goods was a damage which unquestionably resulted from the bone-meal heating. The cause of the bone-meal heating is undisclosed; I think it is equally unknown to the libellant as it is to the claimant. The damage to the mineral water was the breakage of bottles. The deposition of the claimant of the larger portion of the mineral waters has been taken, and his admission is that damage was breakage. The damage to the willow-ware was a damage resulting from a fermentation or spores which destroyed the fibre of the willow-ware. The wrappings of the willow-ware were entirely decayed away, due either to a combination of the heat and sweat that was set up by the heating, or from the moisture which was in the atmosphere. That was added to by the mineral water which was freed by the breakage of the [40] bottles. All that character of damage is covered by exceptions in the bill of lading. I may say this, while counsel says that the burden of proof is upon us, we admit that if he alleges that all his cargo was damaged, we deny that all of his cargo was damaged; we say that that particular portion which was damaged as far as we know was damaged in this particular way.

Mr. DENMAN.—I understand there will be a reference to the Commissioner. We do not contend that they admit all the damage we claim was inflicted, but that there was damage for which there must be an explanation of some kind.

[**Testimony of Alexander Woodside, for Respondent.**]

ALEXANDER WOODSIDE, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What is your business, Captain Woodside? A. Master stevedore.

Q. How long have you been engaged in that business? A. About twenty years.

Q. Where? A. San Francisco.

Q. During that time what character of ships have you loaded and discharged?

A. All kinds that come here.

Q. Does that include or not include the general type of cargo carrying ships which are plying between Pacific Coast ports and the United Kingdom and Continental ports? A. Yes.

Q. Have you during those years ever discharged bone-meal from ships? A. Yes.

Q. Have you during that period at any time had charge of the stevedoring of the Pacific Mail Steamship Company? A. Yes.

Q. During the period that you have been engaged as a stevedore in this harbor, I will ask you whether or not you have handled any bone-meal from ships?

A. Yes, lots of it.

Q. Have you ever at any time seen any bone-meal that had heated? A. I have not known of any.

[41]

Q. You have not known of any? A. No.

Q. How much bone-meal would you say that you have handled from ships, discharged from ships ar-

(Testimony of Alexander Woodside.)

iving in the port of San Francisco?

A. 30,000 or 40,000 tons.

Q. Where does it largely come from?

A. Calcutta originally, I think.

Q. From what other ports is it brought in?

A. From the Continent.

Q. From the Continent?

A. We have had shipments, yes.

Q. What can you say, Captain Woodside, of No. 1 'tween deck, or in the case of a shelter-deck vessel, of No. 1 shelter-deck hold for a suitable compartment in which to stow mineral water for a voyage from Antwerp to San Francisco?

A. It should be the coolest part of the ship.

Q. If you were to load mineral water into a vessel for a voyage from Antwerp to San Francisco, which compartment of the vessel would you give preference to?

A. Well, we get mineral water in all holds, but of course No. 1 is really the coolest hold, should be the coolest hold in the vessel.

Q. Have you been the stevedore for the Harrison Line which runs in here—is that line plying to this port now? A. Yes.

Q. What size of ships are they operating?

A. Ten and 12,000 ton ships.

Q. Do those ships carry mineral water?

A. Yes.

Q. In what part of the ship is the greater part of the mineral water stowed and customarily carried?

(Testimony of Alexander Woodside.)

A. Well, keep it from the boilers; that is the main thing.

Q. Keep it from the boilers? A. Yes.

Q. Can you state whether or not you find these ships carrying it in No. 1 shelter-deck hold or No. 1 'tween-deck hold? A. Yes, No. 1 and 2 hold.

Q. That is where they carry it?

A. Well, as I say, they carry [42] it in all the holds, as long as it is away from the boilers.

Q. What can you say, Captain Woodside, as to the custom of fastening the 'tween-deck hatches or the hatches leading to the lower holds of the vessel, fastening them down so that they are airtight and water-tight—what is the custom?

A. That is not done.

Q. Never done? A. No.

Q. I will ask you whether or not you have seen vessels come into port with the 'tween-deck hatches laid so as to leave an open space between the hatches to give a free ventilation of air.

A. Lots of times, yes.

Q. Did you see this mineral water that came out of the "Skipton Castle"? A. Yes.

Q. What was the condition of the bottles?

A. It was a very bad shipment, in my opinion.

Q. What was the condition of the bottles?

A. Well, there was plenty of leakage.

Q. I mean the bottles themselves?

A. Exploded bottles, caused by explosion.

The COURT.—Q. Just what do you mean by a bad shipment?

(Testimony of Alexander Woodside.)

A. Well, from our usual way of seeing a shipment, it looked to us at the time a very bad shipment, covered with stain and water from the broken bottles.

Q. You mean when it reached here? A. Yes.

Q. You are not speaking as to its condition when shipped?

A. No, I could not tell anything about it. Turning the cases up, the water would be underneath the cases, and things like that.

Mr. CAMPBELL.—Q. Did you open any of the cases yourself to see the condition of the bottles?

A. Personally I did not.

Q. Did you see the ventilators and the size of the ventilators that were running into No. 1 'tween-deck hold and No. 1 lower hold of the "Skipton Castle"?

A. Well, she had ventilators, I could [43] not just say the size of them; I would say they were probably 16 or 18 inch ventilators.

Q. From what you saw of the "Skipton Castle"—was she in here several times?

A. I am not sure whether she was in a second time or not.

Q. From your recollection of what you saw of her ventilators, what is your judgment as to how her ventilation compared with the usual ventilation on cargo carrying ships?

A. She was ventilated in the usual manner.

Cross-examination.

Mr. DENMAN.—Q. Captain, as I understand it,

(Testimony of Alexander Woodside.)

your testimony in regard to the bone-meal is that you have never taken any off that was heated when you took it off the ship? A. No.

Q. That is all you know about it?

A. We have never had any remarks about it in regard to heating.

Q. What is that?

A. I have never heard any remarks about it in regard to heating.

Q. Never heard any remarks about it? A. No.

Q. That is to say, you don't know of its ever having been taken off a ship when it was heated?

A. We have never taken it off hot.

A. When it was hot? A. No.

Q. You have had to resack it at times, haven't you, shovel it into new bags?

A. That may happen on the wharf; we have got nothing to do with that.

Q. You don't know about that, then?

A. They have the sweepings, of course; the sweepings swept up and put ashore, and I think they pack them away.

Q. That has to be done on practically every shipment of bone-meal, does it not? A. Yes.

Q. Quite a percentage of that, isn't there, of bone-meal? A. Probably 2 or 3 per cent. [44]

Q. Don't it run a good deal more than that on some voyages?

A. That depends on the holds they stow it in; sometimes they stow it in the tanks, and there is considerable because the sacks get torn in taking

(Testimony of Alexander Woodside.)

it out from the angle-irons and things like that in the hold of the vessel that tear up considerable of the sacks, and then of course there is considerable bone-meal to be swept up.

Q. It is the practice and custom to have to resack a great deal of bone-meal, more than other sacked stuff? A. Not if it is in a clear hold.

Q. Can you recall any occasion that illustrates your statement?

A. For instance, the Pacific Mail Company stows it in the tanks, and we generally have more or less than we would have if it had been stowed in an open hold.

Q. You are speaking of the deep tanks?

A. Yes, where there is angle-irons and things like that to cut the sacks on.

Q. Also where there is no ventilation?

A. Well, as to the ventilation I don't know as it has much to do with that.

Q. Captain, you were speaking of the forward 'tween-deck spaces, and that being a good place to stow mineral water, and I suppose the reason you desire to have it there is because of the liability of the waters to explode in changes of temperature, isn't it?

A. No, I would not say that. I would say that the forward hold in the vessel is generally the coolest for the reason that a vessel at sea is driving into the head seas and she has always salt water over it, keeping the forward holds of the vessel cool going

(Testimony of Alexander Woodside.)

through the tropics, more cool than the after end, that would not have the water in the same way.

Q. That is the reason you would want them in the forward between-deck space?

A. And the air at the same time. [45]

Q. And for that reason it would make it difficult to ventilate the forward hold on account of the spray coming over and getting inside of the hatches?

A. If you have bad weather you have got to cover all your ventilators. Many times you have got to put the covers on all the ventilators, in stress of weather.

Q. But that is more particularly true with the forward ventilators on account of the spray coming over?

A. When the weather gets very bad, you have got to cover them all.

Q. But it is very particularly true and more evidently true of the forward ventilators on account of the spray coming over the bow of the ship?

A. When you have bad weather you have to cover all the ventilators.

Q. Haven't you said that the reason why this forward hold is cooler is because you have more water over the deck? A. Not over the deck.

Q. Over the sides of the vessel?

A. Well, I am talking now about the head of the vessel.

Q. Her head is more in the water than she is further astern? A. Yes.

Q. That is your idea? A. Yes.

(Testimony of Alexander Woodside.)

Q. Isn't it true that the forward ventilators you have to close more often in bad wtather than the after ventilators?

A. No, I would not say that.

Q. Do you know anything about the chemical properties of bone-meal? A. No.

Q. It is just bone ground up, isn't it?

A. I presume so.

Q. Right at the slaughter-house?

A. I don't know.

Q. You don't know. Do you know, or don't you know, that it is bones ground up?

A. I presume it is.

Q. Have you ever handled any sacks of it yourself; that is, with your own hands?

A. I turn them over once in a while, probably.

Q. But you have not any experience of your own, actually coming in contact with these cargoes that you take out? [46]

A. Certainly. I am down in the hold all of the time off and on.

Q. Have you ever handled yourself any of the sacks?

A. If you mean slinging the sacks, no, I do not.

Q. How much do the sacks run?

A. A sack probably measures about 18 or 20 inches across by 3 feet or 3½ feet long, about a foot thick.

Q. Do you know how it is applied as a fertilizer, how it is used? A. No.

Q. You say that you would desire to keep the

(Testimony of Alexander Woodside.)

mineral waters away from the boilers. What is the reason for that?

A. Well, you keep mineral waters, you keep liquors and you keep dried fruits and things like that—most of those goods it is stipulated to keep away from the boilers, keep in a cool place; those two holds are the coolest places in the ship.

Q. What would be the difference in temperature between those compartments next the boilers and the compartments out of the end of the vessel?

A. It would be considerable.

Q. 4 or 5 degrees? A. All of that, yes.

Q. You think that would make a difference on the water, do you, on the mineral waters?

A. Well, I don't know as there would be heat enough to do the mineral waters any harm.

Q. You always do stow them away from those holds? A. Not particularly.

Q. I thought you just stated you stowed them far away from the holds that were near the boilers?

A. You take a good many boilers, the construction of them to-day, and there is probably a water-tank between the boiler and the hold abaft of that; the engine-room is forward of the boilers; on the other end you are pretty well clear of it. In the between-decks you probably are over the top of the boilers, maybe nearly.

Q. What difference would that make in the temperature of the [47] 'tween-decks?

A. If you got alongside the boilers, of course it would get hot.

(Testimony of Alexander Woodside.)

Q. Would it ever raise your hold to 90 degrees?

A. If your between-decks is over the top of the boilers, yes.

Q. You would not put your mineral waters in there? A. No.

Q. You think that would be too high a temperature to be a safe thing? A. Yes.

Q. Suppose you found the temperature in your hold 20 degrees or 50 degrees warmer than your outside air, what would you say as to the possible causes of that increased temperature where the general cargo was stowed. Could you get such an increase from any action of the boilers? A. No.

Redirect Examination.

Mr. CAMPBELL.—Q. You have just stated a moment ago that the between-decks near the boilers would be warmer. Is that true of No. 1 'tween-deck hold? A. No.

Q. Is No. 1 'tween-deck hold anywhere near the boilers?

A. That is 2 or 300 feet from the boilers on a ship of that size—probably 150 or 200 feet away from the boilers.

Q. What can you say as to the quantity of ventilation that the “Skipton Castle” had in No. 1 hold as compared with the other holds, that is, the number of ventilators and size of the ventilators?

A. That class of vessel, as a rule, has four ventilators in each hold, two at each end.

Q. Is No. 1 as large as No. 2 hold?

(Testimony of William Edwin Bunker.)

A. No, No. 2 hold is the largest, as a rule, on any ship.

Q. What company are you manager of?

A. San Francisco Stevedoring Company.

Q. Are you the acting manager? A. Yes. [48]

[Testimony of William Edwin Bunker, for Respondent.]

WILLIAM EDWIN BUNKER, called for the Respondent, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. William Edwin Bunker.

Q. What business are you engaged in, Mr. Bunker?

A. Agent for the Pacific Mail Steamship Company.

Q. How long have you been agent of the Pacific Mail Steamship Company at San Francisco?

A. About 8½ years.

Q. For 8½ years? A. Yes.

Q. During that period, has the Pacific Mail carried any bone-meal? A. Considerable.

Q. Have you brought with you any records, or are you able to testify as to the quantity of bone-meal which the Pacific Mail's ships have carried across the Pacific, during the last two years, we will say?

A. Yes.

Q. Will you tell us what those quantities were?

A. In 1912 we carried approximately 30,000 bags, and in 1913, 20,000 bags.

Q. What can you say as to the quantities they

(Testimony of William Edwin Bunker.)

had been carrying in previous years?

A. Well, it has run about the same, as far as I remember.

Q. Does that extend over the period of your agency with the company here, or not?

A. It does.

Q. During all of that time, Mr. Bunker, have you ever known of any of the bone-meal carried by the Pacific Mail ships heating? A. No.

Q. Where does the Pacific Mail pick it up in the Orient? A. Hong Kong.

Q. Where does it come from to Hong Kong?

A. It comes from Calcutta.

Q. Have you ever, during that time, noted any of the sacks of the bone-meal that indicated that they had been heated? A. No, I have not.

Q. Have you ever heard by any report by any officer of your ship that bone-meal was ever heating during those years? A. No. [49]

Q. Have you brought with you this morning any cargo plans of your ships showing where they carried the bone-meal? A. Yes.

Q. Will you produce them and describe to us from those plans where the bone-meal has been carried, and what other cargo has been carried in the same compartments with it?

A. I have brought the plans here of the different types of vessels that we run to the Orient. In some cases the bone-meal has been stowed in the deep tanks; in others, in the hold with general cargo of

(Testimony of William Edwin Bunker.)

all descriptions, merchandise and matting, rice, tea and similar articles.

Q. What is the plan that you have in your hand now?

A. "Manchuria," Voyage 40, October 21, 1913.

Q. Where was the bone-meal carried and stowed then?

A. 1500 sacks of bone-meal were stowed in No. 7 and 8 lower holds, with flour, general merchandise, coffee, tea, matting and rice.

Q. Have you other plans with you? What size ship is the "Manchuria"?

A. The "Manchuria" is 28,000 gross tons. The "Persia," a smaller boat, she had bone-meal in No. 1 orlop deck; there was also pepper in that hold.

Q. What time was that?

A. That is October 12, 1913, Voyage 15.

Q. What size ship is the "Persia"?

A. The "Persia" is about 11,000 tons gross.

Mr. DENMAN.—Of course, I shall object to this testimony unless it is connected up in some way with this man's personal knowledge of the holds. I presume that they are going to make that showing. I reserve my right to strike it out.

Mr. CAMPBELL.—If you have an objection of that character, I would like to have you state it, so that the Court may rule upon it.

Q. Do you know whether or not on those voyages the bone-meal was carried in those places?

A. Why, yes, in a general way, I do.

(Testimony of William Edwin Bunker.)

Q. What do you mean "in a general way"?

A. I could not testify [50] that I have been down in the hold on these particular voyages. At the same time, I am down in the holds in practically every steamer that arrives in port. If not, I see the stowage from the dock. I at least know of seeing bone-meal come out of those hatches.

Q. Why are these stowage plans made up, for what purpose?

A. In order to tell us at San Francisco how much cargo is stowed, so that when the ship arrives we can go to work on her, know where her cargo is, and know the number of gangs to employ and so forth.

Q. Do you rely upon these plans in that?

A. Yes; we do.

Q. By whom are the plans made up?

A. By the chief officer.

Q. When does he make them up?

A. On the voyage to San Francisco.

Mr. DENMAN.—I move to strike out all the testimony of this witness in regard to these specific plans and the stowage of cargo on them. He is not shown to have known these matters of his own knowledge, and, apparently, knows them only by hearsay from documents of officers. Further, it is not shown he knows anything about the conditions in the hold, as to the temperature or changes of temperature on these voyages.

The COURT.—The motion will be denied. I would like to ask you one question: Do you find any

(Testimony of William Edwin Bunker.)

variances in the discharge of cargo, from the stowage plans. A. No, I can't say that I have.

Mr. CAMPBELL.—Q. Just continue, if you will, and give the stowage on other types of your vessels.

A. The "Siberia," 18,000 tons gross ship, a different type from the "Persia" or "Manchuria," had bone-meal in No. 3, with tea, tapioca and rice.

Q. What voyage was that?

A. This is voyage 50, October 31, 1913. The "Nile," Voyage 7, No. 2 lower hold, bone-meal, matting, merchandise. I have given a sample of the different types of vessels we have now. [51]

Q. Have you any cargo plans there showing a voyage of the "Nile" on which bone-meal was stowed with other wet cargo?

Q. Yes, the "Nile," Voyage 8, bone-meal was stowed in No. 3 orlop deck, with Honolulu and San Francisco wet cargo.

Q. What do you mean by "wet cargo"?

A. Soy, saki, and miso—Japanese wet cargo.

Cross-examination.

Mr. DENMAN.—Q. You mean the tub cargoes?

A. In tubs.

Q. Are these tight tubs, tight all over?

A. Yes.

Q. That is, the wet materials could not get out of the tubs?

A. Well, if there was any heat in the hold, the tub would ferment. The soy, particularly, would ferment and burst the head of the tub.

(Testimony of William Edwin Bunker.)

Q. On this voyage, that didn't occur, as I understand it? A. No.

Q. Do you know whether in *any these* cases that bone-meal was put on the vessel wet, of your own knowledge?

A. No, I do not. Our records show that it was received in good condition, though.

Q. Received on your vessel in good condition?

A. Yes.

Q. Of course, if it were wet, it would be noted, would it not? A. Yes.

Q. Do you know of your own knowledge the conditions of temperature in any of those holds on any of those voyages, of your own knowledge?

A. No.

Q. So that all you can testify is that you have seen certain cargo stowage plans, in which bone-meal received in good condition, that is, dry, was stowed with other cargo that might be damaged if the bone-meal had heated?

A. No. I can testify to actually having seen the stowage of bone-meal in our ships with other cargo.

Q. No, I am speaking with reference to these stowage plans, all that you can say—

A. I could not say with respect to these particular plans whether I had seen it or not. [52]

[Testimony of F. W. Tompkins, for Respondent.]

F. W. TOMPKINS, called for the Respondent,
SWORN.

Mr. CAMPBELL.—Q. What is your business, Mr. Tompkins? A. Industrial chemist.

Q. In San Francisco? A. Yes.

Q. Did you examine any willow-ware that came out of the “Skipton Castle”? A. I did.

Q. On or about March 11th?

A. I presume that was the date; I don’t recall that.

Q. By whom were you employed, Mr. Bishop?

A. I think so; Mr. Bishop, or the firm, I don’t remember which.

Q. By the firm of Johnson & Higgins?

A. Johnson & Higgins.

Q. Did you examine any of the willow-ware for salt, to determine whether or not it came in contact with salt water? A. Yes.

Q. What did you find?

A. That there was no more or possibly less than the natural salt.

Q. What was your judgment, from the investigation, as to whether or not it had come in contact with salt water? A. That it had not.

Q. What was the condition of the wrappers around the willow-ware? A. Decayed.

Q. What was the condition of the willow-ware?

A. Well, I believe it was in the same condition. I would have to refresh my memory from the work

(Testimony of F. W. Tompkins.)

in the case. I believe it was the same.

Q. What is that?

A. I say I would have to refresh my memory from the work in the case; practically, as near as I remember, it was all in the same condition.

Q. And that condition was what?

A. The same condition, rotted.

Q. It was rotted? A. Rotted and moldy.

Q. What was the condition of the fibre of the willow-ware?

A. Why, I believe the same. The texture was gone, to a large extent, I believe. I do not remember the willow-ware, in particular. [53]

Q. When you say you would have to refresh your recollection, you mean by reference to what?

A. To a report I made at that time.

Q. Have you the report with you? A. Yes.

Q. If you cannot testify without reference to any report that will refresh your recollection, I will ask the permission of the Court to have the witness refresh his recollection from the record.

Mr. DENMAN.—No objection.

A. Furthermore, a fact which corroborates the general analytical finding is the fact that a role of spores had developed on the wet straw and sacking, and in the case of the latter two, had almost entirely destroyed the textile strength. That covers the thing.

Cross-examination.

Mr. DENMAN.—Q. Mr. Tompkins, may I examine your report?

(Testimony of F. W. Tompkins.)

A. Yes.

Q. Did you go into the hold of this vessel, yourself? A. No.

Q. How much of a piece did you make this report on, this piece of willow-ware?

A. I would not attempt to say, I don't recall.

Q. Have a whole chair, or whole basket, or something of that kind?

A. No. As near as I can recall, a good size, simply. I don't remember the particulars of that. It is three years ago.

Q. You are a chemist, are you not? A. I am.

Q. You are familiar with the properties of bone-meal?

Mr. DENMAN.—I will make him my own witness.

[Testimony of F. W. Tompkins, for Libelants.]

F. W. TOMPKINS, recalled for libelants.

Mr. DENMAN.—Q. Are you familiar with the properties of bone-meal?

A. To a large extent.

Q. That is an animal fertilizer, is it?

A. Yes. You mean its origin is animal.

Q. Yes. I am not speaking of bone-ash. I am speaking of bone-meal, ordinary bone-meal brought into this port from Euorepan ports. What is the chemical in that that makes it valuable for fertilization, [54] or what are the chemicals?

A. Why, phosphoric acid, which is contained in the bone, dry calcium phosphate, and the ammonia that is contained in the protein, which, in the course

(Testimony of F. W. Tompkins.)

of decomposition, has nitrogen requirements, nitrogen fat.

Q. Suppose your bone-meal is wet after it is ground and stacked up in piles while it is wet, will it have a tendency to ferment?

A. I should believe so, if the moisture was sufficient.

Q. That has been the experience of the manufacturers here, has it not?

A. That I don't know. I am only speaking from the theoretical supposition. A special observation I have never made in that respect.

Q. Would it not be inevitable that you would get heating and fermentation if the bone-meal were wet and stowed in piles?

A. I would not want to say it would be inevitable. I would say a likelihood of it, depending on associated conditions, possibly.

Q. What do you mean by "associated conditions." Suppose now that you associated the condition of the temperature of 85°?

A. That would be a favorable indication, I think, in the presence of sufficient moisture.

Q. If that bone-meal were in sacks, and there was sufficient moisture there to create this fermentation and heating, would you be able to notice it in handling the sacks?

A. Well, I should imagine you would. I do not really know about that. If the heating has taken place—

(Testimony of F. W. Tompkins.)

Q. (Intg.) I am presuming now that this is before the sacks are piled, but it has been wet, would it have to be sufficiently wet for you to notice that?

A. I don't think it would. The outside would dry out quickly and the inside might be quite damp. The external indications would not amount to any great deal.

Q. Would not amount to a great deal? A. No.
[55]

Q. So that any time you might have this damp bone-meal on your hands with its power of heating up and at the same time not be aware of it?

A. Yes, although when you have control of it, the uniform weight of the sack gives very nearly a definite amount; that would be noticeable if it were over that.

Q. It would show it in that way?

A. It should, or at least it would be a means of showing it.

Q. Have you figured how much it would take?

A. It is really a matter of mathematical figures; if it took up 10 per cent—

Q. (Intg.) Have you ever figured what percentage of increase in weight would be necessary to start it fermenting? A. No.

Q. Would that be appreciable? A. No.

Q. Would not that depend upon the amount of protein?

A. The amount of protein, the amount of moisture and the degree of fineness of the material. There is no cut-and-dried rule governing it.

(Testimony of F. W. Tompkins.)

Q. How is the ammonia or the nitrogen got out of the bone-meal for the purpose of fertilization?

A. It is a process of decay, it is a conversion of one product into others, into their component parts.

Q. In other words, in order to get the fertilizing effect out of the bone-meal, you have got to go through this heating process in the soil?

A. The decaying process must take place in the soil.

Q. That is the heating process, isn't it—heat accompanies it? A. Yes.

Q. Take a pile of bone-meal which would fill the forward hold of a ship say 18 feet deep and 40 feet wide and 60 feet long, and assume that that bone-meal were in this wet condition sufficient to cause fermentation, and the normal temperature of the hold would be around 80 or 85, and you discovered that the temperature of the hold two days thereafter, after it had been piled there, was around 110, or, say, a week thereafter, a gradual climbing temperature to 110; would [56] you say that there would be sufficient fermentation in the bone-meal to have occasioned that temperature?

A. I do not believe I would be a competent judge.

Q. Would it be reasonable to expect it?

A. Possibly; if there was no ventilation, it might be.

Q. Well, now, isn't it entirely possible that it could run up to 150 degrees?

A. That would entirely depend upon the ability for the temperature to radiate through contact with

(Testimony of F. W. Tompkins.)

the sides or the accessibility of the sides to ventilation.

Q. I am presuming now we have a surface, a radiating surface, which is 40 by 60, and in a hold rising above that, having an area, say, of 40 by 60 by 10?

A. With the radiating surface of wood or metal?

Q. Metal.

A. I don't think I am competent to answer a hypothetical question of that kind.

Q. It would not be impossible?

A. It is too much guess work.

Q. Judging from your knowledge of the chemistry of bone-meal, presuming, also, that you could find no other explanation for the temperature, would it be reasonable, under those circumstances, to attribute it to the fermentation of the bone-meal?

A. Why, I think it is possible, in the event of no other explanation, that that would be at least one reasonable supposition, that might occur.

Cross-examination.

Mr. CAMPBELL.—Q. Mr. Tompkins, what is it that causes coal to heat to a sufficient temperature so that it will take fire in a ship's hold?

A. Well, I am not so familiar with spontaneous combustion of coal; it is due largely to generation of gases.

Q. What, in your judgment, Mr. Tompkins, would be the cause of the decomposition or decay, or fermentation that you found in these baskets and their wrappings?

(Testimony of F. W. Tompkins.)

A. The origin of it was due to the presence of moisture—

Q. (Intg.) Combined *what* what? [57]

A. Combined with normal organisms that always accompany these products, straw or hay, and when they are in a fertile medium, they radiate heat, fermentation and decay.

Q. Would the heat that was exterior to the package of willow-ware itself, assist in this process of decay?

A. Very much.

Q. What would be your judgment as to the normal heat in a ship's hold being sufficient to set up that process of decay?

A. There again I do not believe I am competent to judge.

Redirect Examination.

Mr. DENMAN.—Q. Do you think that the mere passage of sea air through ventilators across the top of bone-meal would generate any such heat as I have described? A. Repeat that again.

Q. Do you think that the mere passage of ventilator sea air across the top of bone-meal, sea air coming up through the ventilator and passing across the top, presuming now that this ventilator on this side sends down a current of air which passes across the top of it and goes over to the other ventilator and goes out, would you think that the sea air passing under those conditions would contain sufficient moisture to cause this fermentation in this way?

A. Why, I should not judge that it would.

Q. You would think that it would require very con-

(Testimony of F. W. Tompkins.)

siderable wetting of the bags, actual wetting of the material, to cause it to ferment?

A. How is that?

Q. You think it would require actual wetting of the material to cause it to ferment?

A. A material of that kind, I would.

Recross-examination.

Mr. CAMPBELL.—If the bone-meal was not thoroughly cured, but was packed in green condition and then stowed in a ship's compartment, would there be any tendency toward this decomposition of the bone-meal that would set up heat? [58]

A. Yes, that would be a more favorable condition.

Q. More favorable. Not actually wet?

A. That is the same as wet. There is another condition of the raw material which enters into the possibility of fermentation very largely, and that is the amount of grease and the proportion of protein matter that is there; if it were not properly eliminated, it would have a tendency to get heated more rapidly.

[Testimony of John A. Bishop, for Respondent.]

JOHN A. BISHOP, called for the Respondent, sworn.

Mr. CAMPBELL.—Q. Are you an employee of the firm of Johnson & Higgins?

A. I am an employee of the firm of Johnson & Higgins.

Q. Did you have charge of the claims that arose from this damaged cargo on the "Skipton Castle"?

A. I did.

Q. Who employed Mr. Tompkins to make an ex-

(Testimony of John A. Bishop.)

amination of the condition of the willow-ware?

A. I did.

Q. Did you see the condition of the mineral water that came out of the ship?

A. My recollection is that I saw a few cases. I did not see the entire shipment.

Q. What was the condition of the bottles?

A. The bottles were broken and the straw was wet and rotted.

Q. Did you see the willow-ware?

A. I saw the willow-ware.

Q. In what condition was that?

A. It had a black mildew. The burlap that was wrapped around it was decayed and rotted.

Q. What was the condition of the willow-ware itself?

A. The willow-ware in places was also decayed and rotted.

Q. When you took it in your hand, how would it act?

A. It would break into small pieces, and in some cases, it would powder.

Mr. DENMAN.—No questions.

Mr. CAMPBELL.—I offer in evidence the depositions of S. M. Keame [59] and Norman Watkins; the depositions of Lambert Page and J. Nelson Craven. I shall have to supply the exhibits which are not here.

Mr. DENMAN.—I want to object to one portion of the deposition last offered, which is the deposition of Lambert Page. At page 62 is the following question:

(Testimony of John A. Bishop.)

“Q. Did you make up the log? A. Yes, sir. Q. And are the facts therein stated true? A. Yes, sir.”

That is making the whole log by that statement as evidence in favor of the claimant who prepared the log. We object to that question. I first object to the question upon the ground it is immaterial, irrelevant, incompetent and hearsay, and self-serving. For instance, here is this situation: this log contains, I suppose, 300 or 400 or one thousand entries, and in an omnibus manner all of these entries are proved up to the Court as true by that single question. If we were to cross-examine, for instance, on that, we would have to go through the entire log. Our contention is, and it has been held repeatedly, it is elementary, that you cannot put in the log to prove your own side of the case; that your opponent may put it in if he deems it wise, but that you cannot prove affirmative facts by such a self-serving document, testified to as being true.

Mr. CAMPBELL.—The record shows that the log was offered in evidence by Mr. Denman, who was asking the witness about it.

The COURT.—The objection would go more to the admissibility of the log than to this declaration.

Mr. DENMAN.—The point I am making is this, that it is an improper question to put to a witness, are all the statements in that book true; you do not have any chance to object to the individual question; you have no chance on that of determining exactly what is intended to be used and what not; you have a vast mass of matter going into the record there as evidence.

(Testimony of John A. Bishop.)

The COURT.—That does not make the matter spoken of evidence. I [60] do not see any objection to the question. If a man is on the witness-stand and testified under oath, and you ask him if the statements there are true, and he says they are, that does not make the log evidence at all.

Mr. DENMAN.—When the log is tendered in evidence, it comes in evidence with that statement annexed to it. I am quite certain that a trial court would not be sustained in any finding that could be based on any statement in that log. Here is a statement. The log is true, the log is in evidence and I have no chance of examining the witness on the specific statement in the log that he may rely on ultimately.

Mr. CAMPBELL.—That question and answer would be of no value to me if you had not offered the log in evidence.

Mr. DENMAN.—I have a right to offer the log in evidence for what it is worth and use it as an admission against you, but I am not compelled to accept all its statements as true.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—I also offer in evidence the deposition of William Baird.

Mr. DENMAN.—I offer the deposition of Joseph A. Anderson on the condition of the Apollinaris water and the cause of the injury to it.

Mr. CAMPBELL.—I have not yet concluded my case. I have two shipmasters, one of whom was to come from Port Costa, this morning, and the other

(Testimony of Thomas L. Brennan.)

whose ship has just arrived in port. I will endeavor to get in touch with them before I come to court this afternoon. I would like to put them on at 2 o'clock.

[61]

[Testimony of Thomas L. Brennan, for Libelant.]

THOMAS L. BRENNAN, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Brennan, what is your occupation? A. An importer.

Q. What firm are you connected with?

A. The American Import Company.

Q. Do you remember the shipment of willow-ware that came to your firm on the "Skipton Castle" some three years ago? A. I do.

Q. Did you see it when it was taken out of the vessel? A. I did.

Q. What was its condition?

A. It was in very bad condition.

Q. Describe it.

A. Well, the coverings on about half of the shipment of baskets were pretty well rotted, and a great many baskets were rotted so that you could break the willow-ware by putting your finger into the bundle; a good many of the others were black. I don't remember seeing any of them moldy. On some of the baskets there was a white deposit.

Q. Has your firm imported baskets on that same voyage before? A. On the same voyage?

Q. On the same voyage from Europe?

A. What do you mean by the same voyage?

(Testimony of Thomas L. Brennan.)

Q. Has your firm imported baskets on the same route?

A. Oh, yes, plenty of them, a great many of them, a great many of them.

Q. Have you ever had any damage similar to this before? A. Nothing similar to this.

Q. How many shipments have you had of these from Europe?

A. I think probably 15 or 20 shipments by that route.

Q. Never had anything like this?

A. Nothing just like this.

Q. Did you have anything similar to it in the way of injury to a large quantity of your baskets?

A. No, we have not. [62]

Q. How general was this injury to the cargo of baskets?

A. Well, we had about 450 bundles of baskets; about 250 of them were so damaged we could not do anything with them. Out of that I should judge that 30 or 40 bundles were very badly damaged; they were in that condition.

Cross-examination.

Mr. CAMPBELL.—Q. What was this other damage that you had suffered from?

A. Well, almost universally the other damage we have is coal dust.

Q. Haven't you found that your baskets are subject to ready decay on long voyages?

A. No, we have not. [63]

[Testimony of Marcus Fisher, for Libelant.]

MARCUS FISHER, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Fisher, you were employed by Tillman & Bendel? A. Yes.

Q. How long have you been employed by them?

A. 27 years.

Q. What is your business with them, what do you do? A. Foreman and receiving clerk.

Q. Do you remember this shipment of mineral waters off the “Skipton Castle”? A. Yes.

Q. About how many cases were there? A. 75.

Q. What was the condition of them?

A. Very bad condition.

Q. Describe it?

A. Well, they were all broken and blown, and the wrappings on the sides of the bottles were rotted out and we had to put new wrappings and everything around them.

Q. Had you ever received any other shipments from Europe by steamer? A. Yes, sir.

Q. Had you ever had any similar experience to this before? A. Never before.

Q. How many shipments do you suppose you have had coming that way? A. In bad condition?

Q. No, coming on that route from Europe here?

A. Well, we have had about 4 or 5 shipments every year.

Q. Of this same Kaiser water? A. Yes.

Q. What is Kaiser water?

A. It is a kind of mineral water.

Q. Is it charged?

(Testimony of Marcus Fisher.)

A. It is not charged—it comes from the spring charged.

Q. It is an effervescent water? A. Yes.

Q. It is a water that is bottled that has gas in it?

A. Yes.

Q. That has been in the market a great many years, hasn't it? A. Yes.

Q. How many bottles were blown to the case, do you recall?

A. Well, they were different; in some there was 5, in some there was 4, in some there was 6, and some none at all. But there was [64] most of them broken more or less in every case.

Q. And the wrappers rotted?

A. Yes, they could not use them.

Cross-examination.

Mr. CAMPBELL.—Q. The bottles, themselves, were broken, were they not? A. Yes.

[Testimony of A. P. Heiser, for Libelant.]

A. P. HEISER, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Heiser, do you recall the discharge of the bottles and willow-ware from the "Skipton Castle"?

A. I recall the receiving of the Apollinaris water into the Peninsular Warehouse, yes, very well.

Q. How many cases did you receive?

A. 575 cases.

Q. What was the condition of the cases?

A. The condition of the cases was that they were wet, moldy and many of them had a substance attached to them similar to bran.

(Testimony of A. P. Heiser.)

Q. Bran?

A. Like bran—it is a substance very much like bran. I could not state what it was.

Q. That was on the boxes?

A. On the outside of the boxes.

Q. What was the condition of the bottles inside?

A. The condition of the bottles was that the bottles were broken, a great many of them blown, and the straw covers that contained them, originally contained them, were rotted and fell to pieces.

Q. Had you ever seen a shipment before in as bad condition?

A. I never in 15 years of experience in handling Apollinaris have seen a condition such as the condition of this shipment.

Q. Do you examine much Apollinaris?

A. In 15 years' time I guess I have personally supervised the examination, I should judge, of from 8 to 10 shipments a year, and out of those 8 or 10 shipments I have examined from 10 per cent of the quantity received down to 1 per cent. [65]

Q. Those shipments came by sea?

A. Yes, those shipments came by sea.

Cross-examination.

Mr. CAMPBELL.—Q. Who is the chief representative here of the Apollinaris agency, you or Mr. Anderson?

A. Mr. Joseph S. Anderson.

Q. What is your position?

A. My position is the proprietor of the Peninsular Warehouse.

(Testimony of A. P. Heiser.)

Q. You are not connected with the Apollinaris Company, itself? A. No.

Q. How near the wharves is the Peninsular Warehouse?

A. The Peninsular Warehouse is located at the northwest corner of Howard and Stewart Streets, within a short half block of the Howard Street wharf.

Mr. DENMAN.—I have no further witnesses at this time. I may want to meet the testimony that is coming on this afternoon. But at the present time, I am through.

(A recess was here taken until two P. M.)

AFTERNOON SESSION.

[Testimony of John Lacoste, for Libelant.]

JOHN LACOSTE, called for the libelant, sworn.

Mr. DENMAN.—Q. Mr. Lacoste, what is your occupation?

A. Cashier for the California Fertilizer Works and Bayle-Lacoste Company.

Q. What is the California Fertilizer Works?

A. Well, we produce and manufacture all kinds of fertilizer.

Q. Do you manufacture a product called bone-meal? A. Yes.

Q. What is that made from?

A. Well, it is made from all kinds of bones of animals, beef, and sheep, and all kinds. [66]

Q. Where are the bones taken from, the slaughter-houses? A. Generally, here.

Q. What is done to them, are they ground up?

A. They are ground up; treated and ground up.

(Testimony of John Lacoste.)

There are different ways of doing it.

Q. Did you ever have any experience with your produce, as to its heating while piled up in stacks?

A. I have.

Q. What is the cause of it?

A. Well, bone, if there is any kind of meat on it, will heat much quicker than will raw-bone.

Q. What is the cause of that heating?

A. The organic matter there is in it, the moisture and fat in it causes heat, and fermenting.

Q. Then the addition of moisture to the bone-meal will help the heating? A. Yes.

Q. Is that a familiar fact known to all the manufacturers of bone-meal? A. Yes.

Q. And you have had experience with this heating in your business? A. Yes.

Cross-examination.

Mr. CAMPBELL.—Q. Bone-meal will heat more quickly if it is green, will it not, than when it is well dried?

A. What we call not clean bone-meal, which is dry, that will heat much quicker; if it is clean, raw bone-meal, it won't heat.

Q. The more thoroughly dried product it is the less inclined it is to heat?

A. When the organic matter is in it, if it is a bone-meal with a certain quantity of meat in it, it will heat. But if it is clean bone, hard bone, is clean, dry hard bone, it won't heat so easy, because it is hard, and it won't decompose as quick as the other on account of the fact that bone won't decompose where meat will.

[Testimony of A. S. Holliday, for Respondent.]

A. S. HOLLIDAY, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Are you a master mariner, Captain? A. Yes.

Q. How long have you been such?

A. About 20 years.

Q. Do you hold British master's papers?

A. Yes.

Q. What ship are you master of now?

A. The "Crown Galicia."

Q. What size vessel is she?

A. She is 3,140 English register tons.

Q. What is her length? A. 40 feet.

Q. What is her gross tonnage?

A. We carry about 8,000 tons dead weight.

Q. Have you any ventilators in your No. 1 hold?

A. Yes.

Q. What is the size of your No. 1 'tween-deck hold?

A. The length of it is about 60 feet, 60 odd feet.

Q. Have you a drawing which you have made of the size of the hold? A. Yes, I have.

Q. Will you produce it, please? A. Yes.

Q. You say that your 'tween-deck hold is 60 feet. What does your plan show?

A. 70 feet between bulkheads.

Q. What are the bulkheads?

A. Iron bulkheads.

Q. Where are the bulkheads located, at the two ends of No. 1 'tween-deck hold?

(Testimony of A. S. Holliday.)

A. Both ends of No. 1 'tween-deck hold.

Q. What is the breadth of the forward end of your No. 1 hold? A. 26 feet.

Q. What is it at the after end? A. 49 feet.

Q. What is the beam of your ship?

A. 52 feet.

Q. What is the height of your 'tween-deck?

A. About 10 feet, No. 1.

Q. How many ventilators have you in your hold?

A. 4.

Q. What is the size of the ventilator that runs from the outside from the upper deck into the 'tween-decks? A. 17 inches.

Q. Is there a ventilator running from that into the lower hold? [68] A. Yes.

Q. Into the hold? A. It telescopes.

Q. What is the size of that?

A. That is about 13 inches.

Q. How many ventilators have you all told in your hold? A. In the hold, 4.

Q. Do you know the steamer "Skipton Castle"?

A. Yes, I have seen her.

Q. Is she as large a vessel as yours?

A. No, she is not as large as mine.

Q. In what trades have you sailed?

A. I have been in the West Indies trade, and running out here from home.

Q. Have you ever carried bone-meal in your ships?

A. Yes.

Q. What trade?

(Testimony of A. S. Holliday.)

A. In both the trade in the West Indies and this trade.

Q. How long were you in the West Indies trade?

A. About 19 years in the West Indies trade.

Q. During that time how frequently did you carry bone-meal?

A. Well, we were carrying, nearly every voyage, fertilizer.

Q. What quantities *would carry* each voyage?

A. Anything from about a hundred tons to maybe 200 tons; it varied.

Q. Have you carried any bone-meal from the Continent to San Francisco, or the Pacific Coast?

A. Yes.

Q. In all your experience, Captain, in carrying bone-meal, have you ever known it to heat on ship-board?

A. No, I have never seen it heat.

Q. What hold of your vessel would you consider most suitable to carry mineral water?

A. Well, we stow the mineral water in all the holds, as a rule, but the best of them would have been 1 and 4—they would have been the best holds. [69]

Q. What are the numbers of the extreme holds?

A. Nos. 1 and 4.

Q. At the extreme ends?

A. Yes, we have four holds.

Q. What can you say as to whether or not No. 1 hold is as well a ventilated hold as the others in the ship?

A. Yes, they are just the same, the ventilation is the same.

(Testimony of A. S. Holliday.)

Cross-examination.

Mr. DENMAN.—Captain, as I understand it, your ventilation from, say, the lower hold No. 1 up is through a solid sleeve that runs inside the ventilator to the 'tween-deck space?

A. It is running from 'tween-deck into the upper deck, the ventilator.

Q. But it runs, as I understand it, there is a solid pipe from the lower hold right clear through out to the upper deck?

A. It enters into the upper deck ventilator.

Q. But isn't it solid right through all the way up?

A. It only goes up to the upper deck.

Q. It only goes up to the upper deck? A. Yes.

Q. But it passes through the 'tween-decks?

A. Yes, it is solid.

Q. So that none of that ventilation from the lower hold can get into the 'tween-decks: That is the idea, is it not? A. Yes, it passes right up.

Q. And out of the ship? A. Yes.

Q. The idea being to make two separate holds between the lower hold and the 'tween-decks and to carry the ventilation right through out from the lower hold. A. Yes, it is telescoped.

Q. I mean the purpose of that is to give a separate ventilation?

A. For both the lower hold and the 'tween-decks.

Q. So as to keep them apart; if you have warmer ventilation in the hold it will go up and out?

A. Yes, it passes right up.

Q. I mean the purpose is to have it go up there in-

(Testimony of A. S. Holliday.)

stead of having it mix through the 'tween-deck space?

A. That is right. [70]

Q. Your idea is that the forward 'tween-deck space is the best place to stow mineral waters?

A. I do.

Q. Because there you have the cooling effect of the outside air from the ventilators? A. Yes.

Q. And you can separate it off from the heat of the lower hold? A. Yes.

Q. And by keeping your hatches tight in between decks that will do that?

A. It will ventilate the holds right through.

Q. What do you mean by that?

A. We have got ventilators in each corner, and it will ventilate the lower hold and ventilate the 'tween-decks.

Q. But, as I understand, if you have any warm air in the lower hold you do not desire to have it get into the space where the liquors are, but to go outside?

A. It will pass up outside.

Q. That is the way you desire to have it when you load explosive liquors, like Apollinaris, and that sort of thing?

A. Yes, it is the regular ventilation.

Q. Now, is it not another reason why you desire to stow the mineral waters in the 'tween-deck space, that you want to avoid extremes of temperature?

A. Well, the 'tween-decks space is about as equal in temperature as you can get.

Q. You are getting off, then, from the heat below, and you simply have the equalizing temperature of

(Testimony of A. S. Holliday.)

the air on the outside? A. Yes.

Redirect Examination.

Mr. CAMPBELL.—Q. What do you mean by getting off from the heat below? Do you find your lower holds are materially warmer than the 'tween-deck holds?

A. The wind passes down one ventilator and it gets into the 'tween-decks and also into the lower hold, passes across through the ship and up through the other ventilator. One ventilator is turned to the wind and another back to the wind, and makes a circulation of air right through all the time in the 'tween-decks and lower holds. [71]

Q. Is there any material difference between the temperature in the lower hold and the 'tween-decks hold?

A. No, there is no material difference at all.

Recross-examination.

Mr. DENMAN.—Q. Do I understand your idea is you do not want to separate your vessel into holds, but that you want to have it all mixed up together, so that all the ventilation in the vessel will move through all the holds, or isn't it your desire to have each hold separate in itself?

A. You cannot have each hold separate in itself.

Q. Why not? A. Because you cannot.

Q. I mean for the purpose of ventilation, isn't it your desire to have each hold separate by itself?

A. You cannot possibly have each hold separate by itself.

Q. Why not?

(Testimony of A. S. Holliday.)

A. You cannot separate the lower hold from the 'tween-decks.

Q. Why not?

A. Because you cannot. I don't see how you can.

Q. You mean because one is on top of the other?

A. Yes.

Q. But your hatches are put on there to keep them apart?

A. Yes, they have hatches on, but they are never battened down.

Q. They are not battened down, but they are on there so as to prevent the circulation of air between the two spaces?

A. They are on there to stow cargo on top of, not to circulate the ventilation at all. The hatch is to stow the cargo on top of.

Q. Why do you have a separate sleeve, a separate ventilator for the 'tween-decks and your lower hold?

A. You must have, because the ventilator on the deck is a large one. From the 'tween-decks it comes up into a tube; the air comes down the side of this tube into the 'tween-decks, and then it passes down the tube also into the lower hold.

Q. But those are separate systems?

A. They are all one system. [72]

Q. Separate flows of air, I mean.

A. There will be separate flows of air; there are separate flows going through the lower holds.

Q. Is it your idea that the lower hold, if it has any warm air in it, ought to be ventilated up through the upper hold, or ought to go up through the ventilator?

(Testimony of A. S. Holliday.)

A. Through the ventilator.

Q. That is the idea of ventilating the lower hold?

A. Yes, that is how we ventilate it.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Just give us a rough sketch, so that we can understand how one ventilator fits into the other. Assume that is the 'tween-deck and this is the lower hold. Show us how your ventilators are.

A. This is the ventilator here. Then there is a tube that comes from the 'tween-decks up and there is a space of about two inches all around this one. This ventilation passes up through here, the air would come down here into the lower hold, and it would also come down here and into the 'tween-decks.

Q. It comes from the outside down where I have marked an arrow 1 into what?

A. The 'tween-decks.

Q. And where I have marked the arrow 2, the lower hold? A. Yes.

Q. You said the space between the sleeve to the ventilator is about 2 inches?

A. About 2 inches around.

Q. And the upper ventilator on your ship is 13 inches in diameter and the one leading into the lower hold is about 13 inches? A. Yes.

Q. There are four ventilators in No. 1 hold?

A. Four in No. 1.

Mr. CAMPBELL.—I will offer that in evidence as Claimant's Exhibit 1.

(Testimony of A. S. Holliday.)

Q. How old is your ship, Captain?

A. 8 years in October.

Q. How does the system on your vessel compare with the usual system of ventilation on British cargo carrying ships?

A. It is the usual system that we have. [73]

Further Recross-examination.

Mr. DENMAN.—Q. By the usual system you mean it is the system of having a sleeve inside?

A. From the 'tween-decks up into the upper deck.

Q. You are speaking now of the appliances for ventilation, when you say it is the usual system?

A. That is the usual ventilation.

Q. Now, look at this exhibit that has just been put in evidence, and I will ask you whether or not the air travelling from two up out of the ventilator, that is on the reverse ventilator—

A. (Intg.) The reverse ventilator.

Q. Should be allowed to mix in with this 'tween-decks hold or whether it ought to go right up outside?

A. It does pass right outside, because this tube is up into the ventilator about two or three inches.

Q. That is what it is intended to do, is it not?

A. The air passes up there.

Q. And that is the purpose of having your ventilator in that form, to give a separate flow of air from the lower hold to the outside?

A. Yes, to ventilate the lower hold as well as the 'tween-decks.

(Testimony of A. S. Holliday.)

Q. I will ask you again, does this ventilator through which the arrow marked "2" passes, does that ventilate the 'tween-decks?

A. No, it does not. This ventilates the lower hold, this portion here. That is what ventilates the 'tween-decks, there.

Q. By the part that ventilates the 'tween-decks, you mean the portion between "2," where it emerges into the hatch and the outer edge of the hatch?

A. There is a two-inch space there.

Q. In order to make it clear, I ask you again whether this ventilator from the lower hold is intended, as the air passes through there, to mix the air in the 'tween-decks?

A. No, it is not intended to mix. [74]

Q. The subject is to take any warm air in the lower hold out without reaching the 'tween-decks?

A. Yes, it passes right up that chimney.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Do you ever batten your 'tween-decks down so as to make them air tight?

A. No.

Q. Did you ever see them battened down tight in a ship? A. No.

Q. Do they put the hatches on simply to hold cargo, so that you may stow cargo on top of them?

A. Yes.

Further Recross-examination.

Mr. DENMAN.—Q. You do not expect to ventilate through these hatches; you ventilate through the ventilators?

(Testimony of A. S. Holliday.)

A. That is what they are there for.

Q. You don't ventilate through those hatches?

A. No.

Mr. CAMPBELL.—I offer in evidence, if the Court please, the bills of lading covering this shipment, and ask that they be marked "Claimant's Exhibit 2."

[Endorsed]: Filed Apr. 3, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [75]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

(No. 15,156.)

THE AMERICAN IMPORT COMPANY, a Corporation,
et al.,

Libelants,

vs.

THE BRITISH STEAMER "SKIPTON, CASTLE," Her Engines, etc.,

Respondent.

**(Deposition of Joseph S. Anderson, Taken on Behalf
of Libelants.)**

BE IT REMEMBERED that on Wednesday, March 25th, 1914, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. Denman & Arnold, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull,

(Deposition of Joseph S. Anderson.)

a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Joseph S. Anderson, a witness, produced on behalf of the libelants.

William Denman, Esq., appeared as proctor for the Libelants, and Ira A. Campbell, Esq., appeared as proctor for the respondent, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say, as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties, that the deposition of Joseph S. Anderson may be taken *de bene esse* on behalf of the libelants, at the office of Messrs. Denman & Arnold, in the city and county of San Francisco, State of California, on Wednesday, March 25th, 1914, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by [76] Herbert Bennett.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(Deposition of Joseph S. Anderson.)

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.)

JOSEPH S. ANDERSON, called for the libellant, sworn.

Mr. DENMAN.—Q. Mr. Anderson, what is your occupation?

A. The representative of the Apollinaris Agency Company of New York.

Q. What is the business of that company?

A. They are the representatives of the Apollinaris Company of London for the United States of America.

Q. What is the Apollinaris Company of London?

A. A corporation.

Q. What does it do?

A. It handles the output of the Apollinaris spring at Neuenahr, Germany, and the Apenta spring of Buda Pest, Hungary.

Q. How long have you been connected with the Apollinaris Company? A. About 17 years.

Q. Where did you first do business with them?

A. San Francisco. I have occupied the same position all the time as I do now.

Q. Have you ever had any connection with them prior to that time? A. None at all.

Q. Do you know anything about the commencement of the Apollinaris business in this country, in America?

A. All I know is—the first I ever saw of the water

(Deposition of Joseph S. Anderson.)

was in Canada about in 1886. [77]

Q. Is it a common commercial commodity?

A. It is a commercial commodity the world over.

Q. How long has it been on the market?

A. Between 40 and 50 years.

Q. What is Apollinaris water?

A. It is a natural alkaline water; it is carbonated with its own gas.

Q. Have you ever visited the spring itself?

A. Yes, sir, about seven years ago.

Q. Will you describe the process of taking the water from the spring and preparing it?

A. The water as it exists naturally is warm and in order to not lose the gas which would escape were it brought to the surface, the gas is separated from the water at a depth of 50 feet under the ground; the gas is conveyed through pipes to the tanks and stored; the water is pumped into concrete tanks where it stands for three days approximately; it is forced through cold storage into bottling machines, and the gas is again mixed with it, as much as it will take up. It is then put into bottles and crown caps, or other kind of *camps* put on to it, labelled and put into boxes and exported.

Q. Are you a chemist? A. Yes, sir.

Q. How long have you been a chemist?

A. I graduated about 30 years ago.

Q. You say this is an alkaline water?

A. Yes, sir.

Q. What is the quality of this water, if any, as to heating properties?

(Deposition of Joseph S. Anderson.)

A. Of itself it would not heat. There is nothing of a mechanical composition that could cause it to heat itself.

Q. It is a drinking water, is it not?

A. It is a drinking water, yes, sir.

Q. Could it be used as a drinking water if it contained any acid [78] properties or heating properties?

A. I merely answered your question. If it contained any acid to a marked degree it could not be used for table water.

Q. Would it have to contain acid to a marked degree to have heating qualities in it?

A. It might be acid and still not heat.

Q. Do you recall a shipment of that Apollinaris water on the steamship "Skipton Castle" which left Europe sometime in the month of December, 1910, and arrived here thereafter on a voyage through the Straits of Magellan? A. I do.

Q. Arriving sometime in the early portion of 1911? A. Yes, sir, right.

Q. To whom was that consigned?

A. Consigned to the Apollinaris Agency Company of New York and reconsigned to J. S. Anderson, San Francisco; that was reconsigned for delivery only for custom-house purposes.

Q. You are the representative of the consignee here? A. Yes, sir.

Q. Did you examine the waters? A. I did.

Q. Where did you see them?

A. In the Peninsula Warehouse.

(Deposition of Joseph S. Anderson.)

Q. Where is that located?

A. I am not sure whether I examined them on the dock or not; however, I know that I saw it after it was delivered to the warehouse.

Q. Have you any data which would refresh your memory whether you saw them in the warehouse or on the dock?

A. I can tell by looking up my reports in the matter to the Apollinaris Agency Company at the time.

Q. In what manner had they been prepared for shipment?

A. Straw covers inside of the boxe—each one in a straw cover.

Q. When you first saw the shipment what was the condition of the boxes?

A. They were wet, stained; some of them rotting.

Q. What was the condition of the straw covers?

A. They were absolutely rotten in many instances, and more or less all wet. [79]

Q. What was the condition of the bottles?

A. Some of them—very few of them were in fit condition to market without doing anything to them, but the majority of them that were not broken were wet and the labels destroyed; in many instances completely off of them. Some of the cases were in such a condition that you really could not tell what was in there at all; between broken glasses, rotted straw covers there was hardly any bottles,—perhaps one or two left in a case that were intact.

Q. Do you remember about how many cases there

(Deposition of Joseph S. Anderson.)

were in all of that shipment?

A. I do not remember; about a thousand cases.

Q. That is more or less?

A. More or less; it is so long ago I do not recollect.

Mr. DENMAN.—The exact quantities and the proof of damage will be made at the reference when or if the reference be ordered.

Mr. CAMPBELL.—At this time we ask that the bill of lading be produced.

Mr. DENMAN.—Q. Didn't you surrender the bill of lading in order to get the shipment?

A. I am not sure whether I did at that time, now they demand it; at that time I am not certain. I have not got the original. The original we surrendered to the custom-house. I doubt whether I ever got an original. I know one copy is surrendered to the custom-house.

Q. Have you the original bill of lading?

A. No, sir.

Q. Do you remember whether there was one or two bills of lading? A. Two come to me.

Mr. DENMAN.—They are in the custom-house, Mr. Campbell; if you ask me to make any admission concerning the contents of the bill I will be glad to.

Mr. CAMPBELL.—Have you the second copy that was given Mr. Anderson?

Mr. DENMAN.—I thought I had it. I find I have in the other cases in which Mr. Anderson is not interested. [80]

The WITNESS.—It is possible the correspond-

(Deposition of Joseph S. Anderson.)

ence will show. I may have surrendered my copy with the claim, I very generally do.

Mr. CAMPBELL.—Q. Will you search your files to see if you have your copy still?

A. (Addressing Mr. Denman.) Didn't I surrender my correspondence to you in that case?

Mr. DENMAN.—I have some of your correspondence here; I have not got those bills.

The WITNESS.—I do not think I have got anything connected with the thing at all.

Mr. DENMAN.—Q. Did you examine any of the broken bottles?

A. Yes, sir.

Q. What type of bottles were they?

A. They were the regular bottles that are being used at the present time and have been used.

Q. Have you ever had any shipment of those by sea from Europe?

A. We are receiving them right now, right along.

Q. For how many years have you been receiving them from Europe by sea?

A. We have been receiving them during the entire time, 17 years, I have been with them.

Q. Have you ever had any shipment from Europe arriving in the condition that this shipment arrived in?

A. Never in as bad a condition as that and the only other shipment that we ever had that could be compared with it at all was a shipment that was brought by one of the steamers of the Royal Mail

(Deposition of Joseph S. Anderson.)

Packet, I believe, to Salinas Cruz, thence by the Tehauntepac Railroad, and by one of the American-Hawaiian steamers to this port, and that shipment we found to be in very bad condition, bottles broken, and we discovered that it had been kept at a port on the Isthmus which I believe was Salinas Cruz for about 30th days at a galvanized warehouse, and the exposure there caused it to blow up.

Mr. CAMPBELL.—Q. That is purely what somebody else has told you?

A. The discovery was made from the American-Hawaiian Steamship Company under admissions themselves. [81]

Q. It is not original knowledge with you, it is knowledge you have obtained from other sources?

A. I was not there.

Mr. CAMPBELL.—We ask that be stricken out as hearsay.

Mr. DENMAN.—Q. You never had any other shipment other than the American-Hawaiian shipment that has arrived with the bottles blown up as in this case?

A. No, sir, none.

Q. How many shipments in all do you suppose you have had that have come around South America in that time? A. Between 200 and 250.

Q. Could the injuries which these bottles suffered have been incurred prior to the goods being stowed on the ship and still the packages not have shown them on the outside? A. I don't think it possible.

Q. Could you tell from an examination of the

(Deposition of Joseph S. Anderson.)

straw what had occasioned the injury to it?

A. I could not.

Q. Would ordinary rotting have done it?

A. We could tell that the injury was caused by water and the straws rotten.

Q. Well, would ordinary water damage to the straw be sufficient to put it in the condition which you found it?

A. In this instance there seemed—the condition of the straw covers seemed to be that there was some outside agent more than ordinary water because the straw covers were contracted and in a more rotted condition than I ever saw them before; ordinarily the straw covers are—while very much discolored and sometimes rotten they remain intact around the bottom. In this instance they were ro very rotten and off the bottom.

Q. When you say ordinarily, you mean ordinarily when they are damaged at all?

A. Ordinarily where they are damaged from water.

Q. From your knowledge of chemistry and your familiarity with the Apollinaris water what would you say was the occasion *to* the injury of the bottles as you found them in the warehouse or wharf after their arrival in San Francisco? [82]

Mr. CAMPBELL.—Objected to as called for the conclusion of the witness.

A. These bottles were broken and in a different way to a bottle that is smashed or found broken in cases such as we frequently come across owing to

(Deposition of Joseph S. Anderson.)

rough handling. We very often find shipments, especially when they have been handled from ship to ship on account of damage to the ship across the Tehautepac, or where handled several times there is quite a loss from breakage, but those bottles are generally on the bottom or top and the bottle broken in small fragments. On this ship the bottles were broken, very many of them, by the side being blown out, and it appeared to me that the damage was caused by expansion and the expansion caused by heat.

Q. What is the upper limit of temperature at which it is deemed safe to stow or store Apollinaris water?

A. A case of water as it is packed would stand for a time, for instance, out on a sidewalk for shipment or having been delivered and put out on a sidewalk—we ship right along to points where the temperature, like Sacramento in the summer-time, where on a dray out on the sidewalk for a short time it might be exposed to 115, or I presume it might be 115 in the shade and the temperature is still higher; we would make those shipments right along and no trouble, but if that case were left in that sun until the contents of the bottle got to 115 or 120 at least some of those bottles that were filled pretty well up would be apt to blow up on account of the expansion of the water and gas.

Q. What would you say was a safe limit that you could heat the bottles to and not have danger of such explosion?

(Deposition of Joseph S. Anderson.)

A. I have never made a test of that, but I would say around 120 that they would be apt to blow up. They might blow up at less than that.

Q. Now, what types of bottles do you carry this Apollinaris water in?

A. We import two shapes, one called the Bordeaux bottle, which [83] is the wine bottle, the wine-shaped bottle; the other shape is what is ordinarily called the Vichy-shape bottle, which is the same shape as beer is bottled in, a slope bottle.

Q. Are you using both shapes now?

A. Yes, sir, receiving them right along.

Q. Everything going on this voyage around South America?

A. Both of them; nearly every boat carries a consignment of both shapes.

Cross-examination.

Mr. CAMPBELL.—Q. Mr. Anderson, what is the reason for their passing the water through cold storage before it is put into the bottling machines prior to the time that the gas is again put back into the water?

A. Because carbonic acid gas is almost impossible to mix it with anything but cold water; if you go to mix it with warm water it will not mix in with it.

Q. Then this water when bottled is bottled at low temperature? A. At low temperature.

Q. And that is for the purpose of confining the gas to the water? A. To the water, yes.

Q. And as the temperature of the water is in-

(Deposition of Joseph S. Anderson.)

creased above that *water* which it is bottled the water tends to throw off the carbon gas?

A. The only explanation that I can give of that is this: That if you open a bottle of any carbonized beverage, whether it is champagne or water, if it is at all warm, that is say 85 or 90 degrees, when you open it the cork will fly and the water and gas will come out of it; whereas had that bottle been at a colder temperature, say at 50 degrees, you could open it without it flying up; and the time you take the cork, if the gas is mixed in with the water, whether cold or hot, it cannot fly, it is inside the bottle.

Q. But as the temperature of the water increases above that at the time when it was bottled the pressure on the bottle would be [84] increased?

A. Yes, sir.

Q. By the tendency of the gas to be thrown off?

A. Yes, sir, there is a greater strain on the bottle the higher the temperature goes.

Q. Then if this Apollinaris water was bottled at that low temperature and was shipped to the port of loading in the winter-time in Europe, and was afterwards stowed in the hold of the ship which passed through tropical climes, or if the hold of the ship was at a higher temperature than the winter weather at the port of loading the pressure on these bottles would increase?

A. I could not tell you at just what point it would begin to increase, but the strain on the bottle between a temperature of 50 degrees and 90 or 100

(Deposition of Joseph S. Anderson.)

would be very much *great* at 90 or 100.

Q. Your own judgment is, however, the bottles would not *blow until* a temperature of about 120 degrees is reached?

A. I saw offhand without knowledge of it they would not stand 120, but how much lower than that I am not prepared to say.

Q. Would that require a temperature which would raise the temperature of the water itself to 120 degrees?

A. The temperature of the water would have to be raised in order to *blow the* bottle.

Q. Would *that* take any considerable period of time to raise the temperature in 500 cases which were stowed together?

A. I could not tell how long it would take to do it. If you put a case of that in a room of 120 degrees it would not take very long, a few hours would do it.

Q. Your own judgment then is—

A. (Intg.) In line of what you have asked with regard to these bottles, they are filled at this very low temperature, or whatever it may be, at a temperature somewhere around 40; they are all stowed upon the ground for several days before being put in straw covers [85] so that if any bottles are weak or anything else would be apt to blow up under ordinary conditions will blow up before they are put in straw covers at all.

Q. Whereabouts on the ground?

A. Stowed right on the ground close to where they are bottled at the springs.

(Deposition of Joseph S. Anderson.)

Q. In the open air?

A. No, sir, inside the building.

Q. Are those buildings heated as a rule?

A. I do not think there is any heat in them at all.

Q. That test would depend upon the temperature of the air itself? A. Yes, sir.

Q. And the temperature of the air in the winter season over there would be lower than the temperature of the air in the summer season?

A. They do not bottle in the winter season.

Q. Won't they bottle in December?

A. I do not think it is possible. I know there are several months in the winter-time they do not bottle at all; the cases are brought down to Antwerpt and put in warehouses for shipment because they cannot bring them down the Rhine; they cannot work at the spring at all.

Q. You do not know how long these bottles had been stowed in warehouses at Antwerpt prior to shipment on this vessel?

A. I believe my records will show that the same course was adopted—I cannot answer that question because I have not got my data here; if I were to look up my records it will show that this particular shipment was brought down the Rhine and delivered from the Rhine boats on to the wharf or brought into the steamer. That is the usual mode of procedure.

Q. Then, if that were true they were bottles which had probably been bottled at the springs prior to shipping down the Rhine?

(Deposition of Joseph S. Anderson.)

A. Bottled within 30 days prior to delivering those.

Q. That would be the winter season in that country?

A. Not in November; if they were delivered ex-Rhine boat they would [86] have been bottled in cold weather; if bottled ex-warehouse it might have been 30 days.

Q. If bottled within 30 days and the test you have described of standing on the ground they would not meet with the same tests as when the water had been bottled in the summer months when the temperature was higher?

A. I presume they would not. As I say, I have no knowledge of when those bottles were actually bottled, whether 30, 60 or 90 days before.

Q. When this shipment arrived and you examined it you found the damage to be of three kinds. First, that the bottles were broken, is that true?

A. Yes, sir.

Q. Secondly, that the straw covers were rotted?

A. Yes, sir.

Q. That is the straw covers and wrappers around the bottles? A. Yes, sir.

Q. And the wrappers or labels whichever you may call them were destroyed and stained and some of them damaged so they could not be used at all. That the damage was of three kinds; first, the breakage of bottles; the rotting of the straw covers and wrappers, and staining or damage of the paper wrappers or labels on the bottles?

(Deposition of Joseph S. Anderson.)

A. That is right.

Q. Now, you said that the water was shipped in two kinds of bottles, the Bordeaux bottle and the Vichy bottle? A. Yes, sir.

Q. Which of the two kinds of bottles was it that you had made complaint to your principals about using?

A. I had complained to them about using the Vichy bottle for this country. The Vichy bottle is the usual ordinary shape shipped to the United States. The Bordeaux is only shipped to San Francisco. I complained about the Vichy bottle, I did not want it here at all.

Q. Was not your complaint based upon the fact that you found that one style of bottle broke more easily than the other? [87]

A. No, sir, the complaint was because the Bordeaux bottle was brought to this country for the reason when it is empty it can be filled with wine, and it was sold for \$1.65 a case when empty, while the other bottle was valueless practically, nobody wanted them, and the value of the bottle was because it was a Bordeaux-shape bottle and could be filled with California wines and sold to the wine people.

Q. If you will carefully refresh your recollection and see if you cannot recall a conversation with Mr. Bishop in which you told him that one type of bottle or the other you had found to be subject to greater breakage.

A. In this particular shipment it shows that the

(Deposition of Joseph S. Anderson.)

Vichy-shape bottle had a much greater breakage than the other.

Q. Didn't you tell him at that time in your conversation with him that it had been your experience from these shipments that that type of bottle *was easily* broken than the Bordeaux, and how you had complained to your principals about shipping the water in those bottles?

A. If I ever made a remark of that kind it was on account of the packing of them, they were packed different, we had to make some change in the way they were packed in the case; there would be breakage from handling.

Q. That was because your experience has shown you in the shipment of the water in Vichy bottles they were subject to greater breakage than in Bordeaux bottles? A. If roughly handled.

Q. Had you not made complaint to your principals against the use of the Vichy type of bottle because of the breakage which you had experienced?

A. I made the complaint to them about shipping them; they had showed a greater breakage on the outside than the Bordeaux bottle, and they would have to change their style of packing or else put heavier covers on them, they did not seem to stand their shipment as well as the Bordeaux bottles. That is, the breakage being [88] in that extent from the rough handling in shipment.

Q. You made no contention then that there was any of this breakage due to rough handling?

(Deposition of Joseph S. Anderson.)

A. I would not say there was none of it.

Q. Is there any part of it which you can point to to-day which you would say was due to rough handling?

A. Collectively speaking, I would say this damage was not caused by rough handling for the reason if a case is roughly handled the breakage is on the outside, on the bottom or top. There is only a straw cover between the bottle and case and a violent knock would break it. In this case the breakage was just as bad in the center as it was on the outside, that applied to both shapes of bottles.

Q. That breakage you attributed to a heat that was extraneous to the bottle itself?

A. I do not believe it possible to heat the water up from anything within itself. That is I mean Apollinaris water would stand in ordinary temperatures or any temperatures so far as that is concerned; there is no chemical composition in it that would cause it to heat up.

Q. Is it your belief that this breakage of the bottles was caused by a heating of the water in some way?

A. I believe it was caused by the heating of the water in the bottle.

Q. And that heat was heat that was extraneous to the bottle itself? A. Some outside heat.

Q. Outside heat? A. Outside heat.

Q. Heat that might be termed extraneous to the bottle that was applied to the bottle?

A. I don't know what sort. There may have been

(Deposition of Joseph S. Anderson.)

some heating up. I don't think it could be possible to cause it from the contents of the bottle, in fact I am sure it could not, unless something from the outside that caused that bottle to heat up,—subjected to a strong heat.

Q. The result of the breaking of the bottles was a waste of the [89] mineral water itself?

A. Waste of the bottles and water.

Q. Waste of the bottles and the mineral water in the bottles? A. Yes, sir.

Mr. DENMAN.—We admit that to be true.

Mr. CAMPBELL.—Q. There is hardly ever a shipment arriving by ship in which you do not have breakage of your bottles, is there?

A. Most shipments we have so small a breakage that we never think of making a claim for it. We have a few rattling cases which are repacked; five per cent will be rattling and show some breakage; in opening those cases we find one and sometimes two broken bottles; we do not have occasion to make a claim for any damage—

Q. (Intg.) I am not speaking about claims, I am speaking about the breakage of bottles?

A. It is so very small we do not make claim.

Q. Every shipment you receive you find breakage amongst your bottles?

A. Sometimes we will have occasionally five per cent rattling that we will have to repack and we find one or two bottles in the case broken of the one found rattling.

Q. Have you practiced chemistry since you have

(Deposition of Joseph S. Anderson.)

been the agent of this water?

A. I have not been actively engaged.

Redirect Examination.

Mr. DENMAN.—Q. Mr. Anderson, do you know a commercial water known as Vichy? A. Yes, sir.

Q. Where does that come from? A. France.

Q. What type of bottle is that shipped to this port in?

A. It comes in approximately the same shape bottle as the Vichy or slope neck that the Apollinaris comes in except that it has a larger bottom, a little different shaped bottom; it is a flat bottom while this bottle has got a concave bottom.

Q. Do you know water called the Kaiser water?

A. The Kaiser water is a German water and to all intents and purposes it is almost identical to the Apollinaris. [90]

Q. Where does that come from? A. Germany.

Q. Anywhere near the Apollinaris?

A. I could not tell you where the spring is; I know the water very well.

Q. What type of bottle does that come in?

A. I know it used to come in a Bordeaux bottle and I believe it comes in a slope neck bottle.

Q. That is on this voyage you mean?

A. On this voyage.

Q. Now, the Apenta water you have, where does that come from? A. Buda Pest, Hungary.

Q. Was there a breakage in the bottles also?

A. Some breakage, not so much.

Q. Did you notice the character of the breakage?

(Deposition of Joseph S. Anderson.)

A. I cannot recall just what the breakage was.

Q. You have data though where you can show the amount of that breakage, have you not?

A. Yes, sir.

Q. Let me ask you, where this water was stowed would make it more likely to break?

A. If exposed to a high heat then quickly exposed to cold I would say that it is possible that the glass will crack from such a change.

Q. Suppose you have this situation, that the heat of the water is somewhere between 100 or 120 degrees and the bottles so heated are exposed to a blast of air around 50 degrees of temperature?

A. I would say that it would cause the glass to break.

Q. You would expect to find breakage under those circumstances?

A. I would expect to find breakage under those conditions.

Q. What part of the ship should these cases be stowed in?

Mr. CAMPBELL.—I would like to ask the witness whether he considers himself an expert on stowage.

Mr. DENMAN.—Examining the temperature.

A. The instructions of the Apollinaris Company for the storing of [91] their goods is they should be stored under the water line fore and aft.

Q. What is the purpose of having them under the water?

A. On account of keeping cool and far away from the boilers especially on steamers.

(Deposition of Joseph S. Anderson.)

Recross-examination.

Mr. CAMPBELL.—Q. You know of no such instructions having been given in this case, do you?

A. Generally speaking.

Q. I am asking you about this case?

A. I do not know anything about instructions.

Q. Do you know any particular ship to which those instructions have been given?

A. I cannot recall now, but I have evidence of it; and can get evidence of it.

Q. You would not attempt to say that instructions had been given to this line of vessels?

A. I would not. I only speak of that generally to show the shipping instructions are to keep it fore and aft under the water line and away from the boilers so as not to be subject to heat.

Q. What you mean to say is that *this your* desire that it be stowed in the coolest portion of the vessel?

A. In the coolest portion of the vessel and away from the boilers.

Q. And as I understand it where it would not be exposed to changes of temperature?

A. Not rapid changes.

Q. Is that contained in the instructions?

A. I do not know what the instructions were regarding the shipment, making this shipment except what is contained in the bill of lading.

Q. You never personally expressed any desire about having it stored where it was not subject to changes of temperature?

A. I do not attend to the shipping at all.

(Deposition of Joseph S. Anderson.)

Further Redirect Examination.

Mr. DENMAN.—Q. It would be true of all carbonated water? [92]

A. All carbonated waters; anything carbonated should be stored in a cool place, whether champagne or water.

Q. And is the same thing true in regard to sudden changes of temperature?

A. Any highly carbonated or highly charged liquid.

Q. You are about to leave the State of California?

A. Yes, sir, I am.

Q. How long are you to be gone?

A. I expect to leave to-morrow and to return about the 20th of April.

Further Recross-examination.

Mr. CAMPBELL.—I want to ask you a little bit more about this change of temperature that counsel has suggested to you.

Q. What do you mean by change of temperature, that it may be brought about by a contact with the boilers or heat from the vessel itself, or that bottles should be stowed in the vessel where they can best maintain an even temperature considering the climatic conditions through which a ship passes on her voyage?

A. I mean it should be stored in such a way that it would not be exposed to extreme heat in any way.

Q. Which is the coolest part of a vessel, and then must maintain an even temperature which can be gotten? A. Yes, sir.

(Deposition of Joseph S. Anderson.)

Mr. CAMPBELL.—That is all.

Mr. DENMAN.—Q. Had you ever had experience prior to your conversation with Mr. Bishop regarding the breakage of bottles, of any type of bottles blowing up which would lead you to tell him that the reason for recommending the use of Bordeaux bottles? A. I don't understand you.

Q. Had you ever had any experience prior to the time of the blowing up of the bottles?

A. No, sir, this was my first experience of the bottles blowing up from heat.

Q. At the time you had this conversation with Mr. Bishop you never had any experience with heat?

A. I don't remember having the conversation with Mr. Bishop. I say though that if I did state anything regarding the breakage on account of one type of bottle [93] as compared with another it was that I found that the slope neck bottle did not ship as well as the other one when exposed to rough handling, and we afterwards put on heavier straw covers on them, and that was overcome entirely.

Q. Have you been using that type of bottle since then?

A. Shipping them almost exclusively since then, slope neck.

Q. Has there been any change in the pressure of strength of the bottle?

A. Just the same; made at the same factory.

Mr. CAMPBELL.—Q. You have had frequent experience of your bottles blowing the corks?

A. We have not used the corks for about 10 or 12 years.

(Deposition of Joseph S. Anderson.)

Q. Whatever you stop the bottles with?

A. We had trouble with the crown caps rusting right through and blowing the water, getting out in that way. That was overcome some year ago by varnishing the caps and making them water-proof.

Mr. DENMAN.—Q. As a matter of fact, you are the inventor of that.

A. I was the originator of that myself.

Q. How long ago was that?

A. About seven years ago. We even now dip them in paraffin to avoid water affecting them in just such instances as this; that if they happen to get wet through any trouble of this kind we will not have the rusting of the caps that we would have if subject to this moisture if they had not been protected, and I would like to say that these very caps that came on this particular shipment were protected.

Mr. CAMPBELL.—Q. What effect would vibration have upon the bottles?

A. Like on a railroad or boat?

Q. Yes. A. No effect.

Q. From the vibration of the engine?

A. No effect.

Q. Don't you desire to keep them away from the engine where they are not subject to vibration?

A. The reason we keep them away from the engine is because of the heat; it is not the engine, it [94] is the boiler.

Q. You want to get them as far from that as possible? A. From the boiler?

Q. Yes.

(Deposition of Joseph S. Anderson.)

A. Far enough away so that the heat of the boiler—

Q. (Intg.) Will not reach them?

A. There is a channel of air through there and as long as they do not set up an excessive heat they will stand an ordinary heat. [95]

United States of America,

State and Northern District of California,

City and County of San Francisco.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness Joseph S. Anderson is material and necessary in the cause in the caption of the said deposition named, and that he is about to go away, and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Wednesday, March 25th, 1914, at 4:00 P. M. I was attended by William Denman, Esq., proctor for the libelants, and by Ira A. Campbell, Esq., proctor for the respondent and by the witness who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said depositions was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennett, and afterwards reduced to type-writing; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

(Deposition of Joseph S. Anderson.)

I further certify that I have retained said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption. [96]

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the city and county of San Francisco, State of California, this 31st day of March, 1914.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Apr. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [97]

*In the District Court of the United States, in and for
the Northern District of California.*

THE AMERICAN IMPORT COMPANY, a Corporation, et al.,

Libelants.

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Etc.,

Respondent.

**(Depositions of Lambert Page and J. Nelson Craven
Taken on Behalf of the Respondent.)**

BE IT REMEMBERED that on Tuesday, May 2d, 1911, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. Page, McCutchen, Knight & Olney, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Lambert Page and J. Nelson Craven, witnesses produced on behalf of the respondent.

William Denman, Esq., appeared as proctor for the libelants, and Ira A. Campbell, Esq., appeared as proctor for the respondent, and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties, that the depositions of Lambert Page and J. Nelson Craven may be taken *de bene esse* on behalf of the respondent at the office of Messrs. Page, McCutchen [98] Knight & Olney, in the city and county of San Francisco, State of California, on Tuesday, May 2d, 1911, before Francis Krull a United States Commissioner for the Northern District of California and in shorthand by Clement Bennett.

It is further stipulated that the depositions, when

(Deposition of Lambert Page.)

written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.)

[Deposition of Lambert Page, for Respondent.]

LAMBERT PAGE called for the respondent, sworn.

Mr. CAMPBELL.—Q. Mr. Page, are you employed on board of the British steamer “Skipton Castle”? A. Yes, sir.

Q. In what capacity? A. Chief officer.

Q. How old are you? A. 34.

Q. How long have you been going to sea?

A. 20 years.

Q. What trade have you been in *an* an officer of a vessel?

A. In the East Indian trade, and North Atlantic trade; South American trade; also around on this coast several times, and around to South America; Red Sea; Persian Gulf.

Q. In what class of vessels have you been to this coast before? A. Sailing vessels.

Q. How long have you been in steamers?

A. About 14 or 15 years; 15 years; between 14 and 15 years. [99]

(Deposition of Lambert Page.)

Q. Were you chief mate on the last voyage of the "Skipton Castle"? A. Yes, sir.

Q. From Antwerp to San Francisco?

A. The last voyage from Antwerp, this last voyage.

Q. To San Francisco? A. Yes, sir.

Q. Was that the trip in which the mineral water in baskets was damaged? A. Yes, sir.

Q. Were you present when this cargo was stowed?

A. Yes, sir.

Q. Under whose supervision was it stowed?

A. Under my supervision; also Captain Baines, who is the surveyor of cargoes in Antwerp.

Mr. CAMPBELL.—Mr. Denman, will you admit these photographs. (Pointing.) They were taken under my supervision.

Mr. DENMAN.—Yes.

Q. Have you a plan of the vessel?

A. Yes, sir. I dare say the captain has one. I have not got a plan myself.

Q. There is one on board?

A. Yes, sir, there is one on board.

Mr. DENMAN.—I would like to have that. I will call for that.

Mr. CAMPBELL.—Do you want it this afternoon?

Mr. DENMAN.—I should like it before the ship leaves. You can get it by phone, I imagine.

Mr. CAMPBELL.—We have one that we will produce.

Mr. DENMAN.—I will admit these photographs.

(Deposition of Lambert Page.)

Mr. CAMPBELL.—Q. Do you know, Mr. Page, where the mineral water was stowed? A. Yes, sir.

Q. On board of the “Skipton Castle”?

A. Yes, sir.

Q. Where was it?

A. In No. 1 between-decks, in the fore part.

Q. I will hand you a photograph which is a photograph of the foreward between-decks hold of the “Skipton Castle,” No. 1, and which photograph I will ask to have marked Respondent’s Exhibit “A” and will ask you if you can show me from the photograph where the [100] mineral water was stowed? A. Yes, sir, exactly.

Q. Whereabouts was it stowed?

A. Up against the ladder, right forward to the ladder; on the fore part of the ladder in the hold between-decks, taken right across the ship, blocked off right across.

Q. That is, it was stowed in that part of the hold which was forward of the ladder? A. Yes, sir.

Q. Extending from side to side of the vessel?

A. Yes, sir.

Q. How close to the upper deck was it stowed?

A. Anything between 9 inches and 15 inches I should say.

Mr. DENMAN.—Q. The upper deck or the upper deck beams?

A. You mean from the main deck?

Mr. CAMPBELL.—Q. Yes.

A. 9 to 15 inches I should say.

Q. Was it stowed up against the deck beams?

(Deposition of Lambert Page.)

A. Close to the beams; within an inch or two.

Q. Was it stowed between the deck beams?

A. No, sir, not between the deck beams.

Q. What was the width of those deck beams?

A. About 8 or 9 inches.

Q. Where were the baskets stowed?

A. They were stowed right in the hatchway, in the main deck hatchway, with a few baskets in the side under some general goods in the wings. Right in the square of the main deck hatch coamings.

Q. I will hand you what purports to be the stowage plan of the "Skipton Castle" and ask you to look at it.

A. Do you want me to take into consideration everything in this plan?

Q. No, just the forward part; and ask you if that in general shows the stowage plan of the cargo?

A. It does. On the fore part here it was all mineral water. This felting was all abaft of that, in the wings of the hatch coamings and on the after part, [101] all abaft of the cargo, this mineral water. Apparently by this plan we have got mineral water stowed on top of the felt, which was not so at all. That would be very bad stowage in that case.

Q. Were any of the baskets stowed abaft of the hatch?

A. Yes, sir; there were a few stowed abaft of the hatch on top of some general goods.

Q. What was stowed in the square of the hatch.

A. I could not exactly say what was stowed in the square of the hatch, just general goods, felting, and a

(Deposition of Lambert Page.)

few barrels of wool grease on the after end.

Q. Where was the cargo which was stowed in the square of the hatch discharged?

A. In San Pedro.

Q. Was part of the baskets discharged at San Pedro?

A. I am not quite sure about that. I don't remember any going ashore at San Pedro, that is baskets,—yes, there were. I remember now there were some baskets for San Pedro.

Mr. DENMAN.—Q. In this hold?

A. Not in No. 1. In the after hold.

Mr. CAMPBELL.—Q. Was there any means of ventilating No. 1 between-decks hold?

A. Yes, sir; we had ventilators in the hold, and also at sea in very fine weather we used to take a couple of hatches off of the fore part and a couple off of the after end.

Q. Can you point out on Respondent's Exhibit "A" any ventilators?

A. Yes, sir; two. That is all this plan shows.

Q. Take this pen and ink with the figures 1 and 2 the ventilators which are shown there. From where did the ventilators run?

A. From the fore-castle-head, through the fore-castle-head, and down into the lower hold. [102]

Q. How far below the between-decks, which is the deck shown in Respondent's Exhibit "A," did the lower end of the ventilators extend?

A. Below the between-decks?

Q. Yes. How far below the between-decks?

(Deposition of Lambert Page.)

A. They were flush with the between-decks, the underneath part of the between-decks.

Q. Handing you another photograph, which I will ask to have marked Respondent's Exhibit "B," I will ask you what part of the ship that portrays?

A. No. 1 hatchway, and the forecastle-head, the forward hold.

Q. Are the upper part of ventilators 1 and 2 shown in that photograph? A. Yes, sir.

Q. Will you mark them also 1 and 2?

A. Yes, sir.

(The witness marks the photograph as requested.)

Q. The top of the ventilator which you have marked 2 is seen just over the top of the canvas.

A. Just over the top of the canvas, yes.

Q. When you were coming out on this voyage, were the tops of the ventilators, as shown in Respondent's Exhibit "B," the same as they are indicated now on the photograph?

A. We had the covers off, and also had ventilators shipped on them. The reason why the ventilators are not on now is we are going to load a cargo of lumber, and we are getting everything ready, and plugging all the ventilators up as we are going to carry lumber. If the deckload was to move at all it would sweep all the ventilators away probably.

Q. Is it customary to move the tops of ventilators when you are carrying a deck cargo?

A. Yes, sir, especially a lumber cargo.

Q. I hand you a third photograph which I ask to have marked Respondent's Exhibit "C," and ask you

(Deposition of Lambert Page.)

if you can show me from that photograph the tops of any ventilators which are similar to the tops which were on ventilators 1 and 2 when you were coming out on [103] the voyage? A. Yes, sir.

Q. Just mark that ventilator A, if you will. As I understand it, while on the voyage coming out there were tops put on ventilators 1 and 2 of the same character as the tops shown by ventilator A on Respondent's Exhibit "C"? A. Yes, sir.

Q. Were there any ventilators in the after part of No. 1 between-deck holds?

A. Yes, sir, two ventilators in the after part.

Q. Will you mark them on Respondent's Exhibit "C," if they are shown, 3 and 4? A. Yes, sir.

(The witness marks the photograph as requested.)

Q. How did the air passing down through ventilators 1, 2 and 3 get into the between-deck hold No. 1?

A. Passing down through the ventilators, how did it get into the between-decks?

Q. Yes; what opening was there, if any, in the ventilators?

A. The lower portion of the ventilator was a sleeve and fitted into the upper part onto the upper deck, which left a space all around the sleeve of about three to four inches.

Q. Make me a diagram, if you can, of the ventilator showing how the sleeve fits in. A. Yes, sir.

(The witness draws a diagram as requested.)

Q. Mark what is represented on your drawing as No. 1 between-deck hold? A. Yes, sir.

(The witness draws as requested.)

(Deposition of Lambert Page.)

Q. Now draw a line down through that ventilator and mark the two ends of it with an arrow like this? Mark it down to show where a current of air passing down the ventilators would go so as to get into No. 1 between-deck hold? A. Yes, sir.

(The witness draws as requested.)

Mr. CAMPBELL.—I will offer this in evidence as Respondent's Exhibit "D." [104]

Q. Would the air passing down through the after ventilator into No. 1 between-deck hold pass through the ventilator in the same way as shown by this drawing, exhibit "D"?

A. Yes, sir, exactly the same.

Q. What is the effect of those ventilators, so far as to give you a circulation of air, through the between-deck hold?

A. Simply to keep the hold in an even temperature throughout.

Q. Is there or not a circulation of air through the between-deck hold by reason of those ventilators?

A. Yes, sir, there is circulation right through the hold.

Q. What season of the year did you leave Antwerp? A. In the winter.

Q. In the winter-time? A. Yes, sir.

Q. What course did you pursue in coming out? What course did you follow in coming out?

A. By the way of Grand Canary Island. We made close to Fernando de Noronha.

Q. By the way of the Straits of Magellan?

A. By the way of the Straits of Magellan.

(Deposition of Lambert Page.)

Q. Were there any rapid changes of temperature as you passed from the climate of Antwerp into the tropical climate?

A. Yes, sir, a very marked change.

Q. Was it a change overnight or a slow and gradual change?

A. A slow and gradual change throughout, with the exception of down towards the Straits of Magellan.

Q. How many holds has this vessel?

A. Four holds.

Q. Where is No. 2 hold?

A. No. 2 is situated just in the fore part of the boiler-room and bunkers.

Q. Can you show me approximately on this photograph where No. 2 hold would be?

A. Yes, sir; it extends right from here (pointing).

Q. Draw a line down the side of the vessel as shown on the photograph to indicate the bulkhead separating the holds. Show me the [105] after bulkhead to No. 2 hold.

A. Right here (pointing). That would be about it, I should think.

Q. Can you show me the forward bulkhead of No. 3 hold?

A. Somewhere about there (marking).

Q. Mark the forward bulkhead of No. 2 hold with the figure 5, and the after bulkhead 6, and the forward bulkhead of No. 3 hold 7. A. Yes, sir.

(The witness does as requested.)

Q. What is abaft of No. 2 hold? What part of

(Deposition of Lambert Page.)

the ship is abaft of No. 2 hold?

A. There are two tanks, and also the bunker and boiler spaces.

Mr. DENMAN.—The mate testifies to only four holds. The log seems to show five.

Mr. CAMPBELL.—Q. Has she four or five holds?

A. We call them tanks sometimes; sometimes we do not.

Mr. DENMAN.—All through the log you call them holds, 1, 2, 3, 4 and 5.

Mr. CAMPBELL.—Q. What do you designate in your log?

Mr. DENMAN.—I do not want to get into confusion about it.

A. Sometimes when we have cargo in the tanks we call that No. 3, the small hatchway just abaft of the bridge.

Mr. CAMPBELL.—Q. Where you have designated throughout your log hold No. 3, and have mentioned five holds, what did you mean by hold No. 3?

A. I have only called it No. 3 when we had cargo down there. We have taken no notice of it at any other time. We do not always carry cargo there.

Q. What part of the ship was it?

A. Amidships part.

Q. What do you call it on board your vessel?

A. The deep tanks

Q. Can you indicate on this photograph the position of the deep tanks?

A. Yes, sir; that is the position.

(Deposition of Lambert Page.)

Q. Make an outline of the deep tanks as near as you can.

A. That is it. (Illustrating). [106]

Q. Mark that with the capital letters D-T.

A. Yes, sir.

(The witness does as requested.)

Q. How many of them are there?

A. Two tanks, one abreast of the other.

Q. One abreast of the other?

A. That looks as if one is on the fore part of the other, but one is abreast of the other.

Q. Where you have called them hold No. 3 what do you mean when you speak of hold No. 4 in your log?

A. The after hold, the hold abaft of the engine-room.

Q. The forward bulkhead of which is marked with the figure 4 on Respondent's Exhibit "C"?

A. Yes, sir.

Mr. DENMAN.—Q. No. 5 is the after hold?

A. Yes, sir.

Mr. CAMPBELL.—I will bring that out.

Q. Is this a hold abaft of No. 4? A. Yes, sir.

Q. What do you call that? A. No. 5.

Q. What is the after end of No. 5 hold?

A. The after end is the well.

Q. With respect to what part of the ship is No. 4 hold abaft?

A. The engine-room; immediately abaft the engine-room.

Q. And is there any part of the ship which runs through the lower part of holds 4 and 5?

(Deposition of Lambert Page.)

A. There is a tunnel and shafting, which runs between holds 4 and 5.

Q. What is the size of the shaft tunnel?

A. Approximately it would be 8 feet 6 in height and in breadth about 8 feet 6.

Q. Where does the forward end of that open?

A. Into the engine-room.

Q. Into the engine-room? A. Yes, sir.

Q. State whether or not it is open so that the air from the engine-room will get into the shaft alley?

A. Yes, sir. [107]

Q. You call it the shaft tunnel and shaft alley.

A. The shaft tunnel.

Q. How was this cargo of mineral water stowed? Just describe the stowage of it.

A. The between-decks was dunnaged, dunnaged 4 to 6 feet on the between-decks, and the sides were matted and blocked off square in the forepart.

Q. The sides of the ship were matted?

A. Yes, sir.

Q. When you come to discharge the mineral water did you find any of the boxes themselves broken?

A. None of the boxes were broken, no.

Q. Was the stowage of the cargo itself at all broken? A. No, sir.

Q. How was it with respect to the condition in which it was shipped—the stowage, I am speaking of now? A. Very perfect stowage.

Q. How was the stowage when you arrived here? How did it compare with the stowage when you left on the voyage? A. Exactly the same.

(Deposition of Lambert Page.)

Q. Had any of the tiers of mineral water been thrown over or thrown down? A. None whatever.

Q. When you came to discharge the mineral water did you find any of the bottles themselves broken?

A. No, sir, I did not find any of the bottles broken, but there was quite a lot of the contents of some bottles that had been leaking, and the cases were stained.

Q. Did you open any of the cases to examine them?

A. No, sir.

Q. Did you see the baskets which were discharged?

A. Yes, sir.

Q. What was their appearance? A. Mildewed.

Q. Were the baskets stowed immediately on the between-decks?

A. Not immediately; on top of some cargo.

Q. What kind of cargo?

A. General goods; cases of felting and barrels of wool grease.

Q. How did you use your ventilators on the voyage? [108]

A. We usually had the ventilators on the mast turned to the wind, and the one on the forecastle-head back to the wind.

Q. What effect did that have on the circulation of air through No. 1 between-deck hold? How did it cause the air to circulate?

A. The intake of the after ventilators was blown right through and the forward ventilators being back to the wind brought out the air through the forward ventilators, forced through.

(Deposition of Lambert Page.)

Q. With your ventilators on the fore-castle-head back to the wind and your ventilators on the mast leading to the after part of No. 1 between-deck hold turned to the wind, through which ventilators would the fresh air pass into the hold?

A. Through the ventilator at the mast, and drive out all the foul air through the forward ones.

Q. When you were passing through the tropics was there any additional means used for ventilating No. 1 between-deck hold other than the four ventilators?

A. Yes, sir. We used to take out two of the forward hatches and two of the after hatches.

Q. Can you show me on Respondent's Exhibit "B" which hatches you would take off?

A. Yes, sir.

Q. Just draw an outline of the hatches which you would take off?

A. Those were the hatches that were taken off (illustrating).

Q. Mark the forward hatch A and the after hatch

B. A. Yes, sir.

(The witness does as requested.)

Q. For what purpose did you remove those hatches?

A. To ventilate the hold; to keep it an even temperature; to keep it from getting heated.

Q. From your experience in ventilating ships will the hold keep cooler by a free ventilation or without ventilation when passing through the Tropics?

A. Free ventilation.

(Deposition of Lambert Page.)

Q. Would you open the forward hatches when you were passing through the Temperate Zone?

A. Certainly. [109]

Q. When you were in the lower latitude would you open these hatches?

A. Not without it was a very fine day.

Q. Did you at any time on the voyage encounter fine days in the lower latitude when the hatches were opened? A. No, sir, we did not.

Q. How close to the forward end of No. 1 hold hatch coaming does the after part of the forecastle-head come?

A. A distance of four feet. The space between the forward part of a hatch coaming to the break of the forecastle?

Q. Yes. A. Four feet.

Q. When you were passing through the Tropics did you use any awnings at all?

A. Yes, sir; the forecastle-head awning was stretched for the benefit of the crew who lived underneath; also we used to stretch an awning on the forward deck so that the crew could sleep at night-time.

Q. What part of the forecastle-head would the awnings stretched over it cover?

A. It would cover the whole of it.

Q. What part of the forward deck would the awnings which you say was stretched cover?

A. It would practically cover all of it, too.

Q. All of it? A. Yes, sir.

Q. Where did you use that? Through what latitudes did you use it?

(Deposition of Lambert Page.)

A. Between 20 north and 20 south.

Q. What region do you call that?

A. The Tropics,

Q. What portion of the ship, or what hold of the ship in your judgment, and based on your experience, maintains the most uniform temperature throughout the voyage? A. No. 1, I should say.

Q. What part of No. 1?

A. More so in the between-decks than the lower hold.

Q. As between the between-decks and the lower hold, which in your judgment would maintain the more uniform temperature?

A. The between-decks. [110]

Q. What is the reason for your answer?

A. It is not exactly well above the water line. The deck is covered with an awning and also by the fore-castle-head, and it does not have the sun's rays penetrating on the deck, during the voyage, as the deck is covered with an awning; and also covered by the fore-castle-head; and it is the furthest hold away from the engine, boiler-room and bunker spaces.

Q. Where is the warmest part of the ship?

A. I should say in the after hold.

Q. Why is that?

A. Because they are immediately aft of the engine-room and boiler-room spaces.

Q. As the ship is running—

A. (Intg.) —forging away, she is causing a slight head wind the whole voyage.

Q. What effect does that have on the heat from the

(Deposition of Lambert Page.)

engine-room and boilers?

A. It drives it aft, especially through the tunnels.

Q. What do you mean by saying "especially through the tunnels"?

A. Any air that went down into the engine-room and went through the stoke hole and into the engine-room would drive right through the tunnel and come out at a small ventilator at the after end of the tunnel. The air after going down there from the fore part and going through the boiler-room, and then the engines-room, would be very hot by the time it got over to the tunnels.

Q. Where does it pass from the engine-room when it leaves the engine-room?

A. Some of it comes up through the engine-room skylights and some through the tunnel.

Q. And this tunnel is at the bottom of No. 4 and 5 holds? A. At the bottom of No. 4 and 5 holds.

Q. When a ship is working in the sea what portion of the ship is subjected to the greatest vibration?

A. The after end.

Q. Why is that?

A. It is nearest to the propeller. [111]

Q. If a ship is working in the sea what is the easiest part of the ship?

A. I should say the amidships part is the easiest.

Q. That is where the boilers and engine-room are?

A. Yes, sir.

Q. How do the forward holds of the ship compare with the after holds as respects vibration when a ship is working in the sea?

(Deposition of Lambert Page.)

A. I should say that the after end vibrates far more than the forward end. It has to contend with both the sea and the propeller.

Q. Did you encounter any seas on this voyage?

A. Yes, sir; we had some very bad weather at times.

Q. Did you encounter any sea which was sufficient to throw the ship's wheel out of the water?

A. I daresay it could be seen at times vibrating.

Q. Could you feel *by* the vibration at all?

A. Yes, sir, racing.

Q. What effect did that have on the after end of the ship when the propeller would be thrown out of the water?

A. She would vibrate, that is all, shake up.

Q. Does the temperature of the water through which the vessel is passing have any effect on the temperature of the interior of the ship?

A. It would in the case of a vessel passing through very cold water, after having warm water, getting into a very cold stream suddenly.

Q. As you were coming from Antwerp to San Francisco did you pass through waters of varying temperature?

A. Yes, sir. Down south we had it varying a little; down close to Magellan Straits, there was quite a marked difference.

Q. Hot or cold?

A. It was fairly warm when southward of the river Platte. As soon as we made the Magellan Straits it was very cold.

(Deposition of Lambert Page.)

Q. Would that change in the temperature of the water on the outside of the ship have any effect on the temperature in the hold? [112]

A. Yes, sir, a little.

Mr. CAMPBELL.—I offer these photographs in evidence.

Cross-examination.

Mr. DENMAN.—Q. To summarize your testimony so far, it is that you put these carbonated mineral waters up forward first because you thought that was the coolest place? A. Yes, sir.

Q. And second because you thought it had less vibration? A. Yes, sir.

Q. Having a less vibration it would be less likely to set off these carbonated waters? A. Yes, sir.

Q. Especially in view of the fact that they were carbonated, it was well to put them up there?

A. It was the best place in the ship, possibly, for them.

Q. When you were loading these various parcels of cargo at Antwerp what was the temperature of the water, pretty cold? A. Very cold.

Q. All through the time there the temperature ran from freezing up to 45?

A. It was never down to freezing. I should say the temperature would be more or less about 40 degrees.

Q. I suppose the temperature of the water was less than that, was it not?

A. I could not say; I don't remember.

Q. It was pretty cold, though?

(Deposition of Lambert Page.)

A. Yes, sir, pretty cold.

Q. What was the condition of the weather while you were loading there?

A. Damp sultry weather.

Q. It could not be very sultry with a thermometer of 40 or 45 degrees, could it? You mean by that that it was raining?

A. It was not raining the whole time; it was raining some time. It was damp, a light drizzly Scotch mist. We had plenty of rain while we were there.

Q. How long before you left Antwerp had you finished No. 1 between-decks? About a day, was it not? About a day before you left you finished No. 1?

A. I think we had finished it the night before or afternoon before we left. [113]

Q. There is a hatch from No. 1 between-decks down into No. 1 lower hold? A. Yes, sir.

Q. That was, of course, covered over?

A. No, sir.

Q. Was that open? A. That was open.

Q. That was open? A. Yes, sir.

Q. During the entire voyage?

A. Yes, sir. There were a few hatches put over, not secured with tarpaulins. The beams were put in the hatchways, and a few of the hatches put over, but no tarpaulins; enough to allow free circulation of air.

Q. Did you have cargo over that? A. Yes, sir.

Q. Was not the cargo stowed—you had felt and general merchandise stowed all over the hatch?

A. All over the hatchway.

Q. So that it was practically tight over there, as

(Deposition of Lambert Page.)

far as cargo could make it?

A. Fairly tight. Only the spaces between the cases, the broken stowage.

Q. What did you have in there? Do you know what I am referring to? I am now referring to the spaces in No. 1 between-decks over the hatch leading to the lower hold.

A. We had crates of felting on the after end, right aft; on the after end of the between-decks were barrels of wool grease and some general goods; and immediately right in the hatch coamings was baskets.

Q. That is to say, between the hatch coamings and the side of the vessel?

A. Right in the upper hatch coaming were these baskets stowed.

Mr. CAMPBELL.—Q. You mean beneath the main deck hatch?

A. Yes, sir, immediately beneath.

Mr. DENMAN.—Q. I see here by the plan that was prepared—

A. There were a few baskets showing where the broken stowage was in the after end.

Q. Are not baskets stowed in this pink space?
[114]

A. Yes, sir, a few put in the side; not many; all in the same hatchway to fill it out, there was not quite enough cargo to fill up the hatchway. It was either that, or a few baskets left over from the after hold to fill up the hatchway.

Q. All the cargo that came to San Francisco was in this after portion of No. 1 between-decks aft the hatch?

(Deposition of Lambert Page.)

Mr. CAMPBELL.—All of what cargo?

Mr. DENMAN.—Q. This cargo of baskets. The baskets that were over the hatch itself, they were for San Pedro? A. Yes, sir.

Q. So that all the San Francisco baskets were aft of this hatch here (pointing), stowed abaft; in the center of the between-decks hatch No. 1 hold?

A. The San Francisco baskets were stowed here (pointing) and also in the wings, just a few, two or three on each side.

Q. How many packages of baskets were there?

A. Down in that hold altogether?

Q. Yes.

A. There might have been a hundred.

Q. As a matter of fact were there not nearly 500 packages of baskets there stowed in that hold?

A. No, sir; I am sure there were not.

Q. Were there any baskets stowed on this vessel for San Francisco that were not stowed in No. 1 between-decks?

A. Yes, sir. I am not quite sure now, as I have not got my own plan with me.

Q. You have seen this plan before (pointing)?

A. I have never seen that plan before. It is the first time I have seen it, but I think there were some down in No. 2 hold, as far as I can remember, from my plan, on the after end of No. 2, but I am not sure about that.

Q. Can you get your plan for us so as to be sure about it?

A. Yes, sir; I daresay I could get it. Will you let

(Deposition of Lambert Page.)

me have a [115] look at that plan? (After examination.) It has got general cargo for San Francisco here on the after end of No. 2 hold, in which I think there was some baskets there for 'Frisco. It is called here "general cargo" but I think there were some baskets among that. It is all general.

Q. What precautions do you take to ventilate the cargo while in port, say, Antwerp? Were the ventilator tops on?

A. The ventilator tops are on, and as a rule all the hatches are off when they are loading.

Q. As a rule all the hatches are off?

A. Yes, sir, with the exception of when it is raining, and then the hatches were covered.

Q. What did you stow in No. 1 lower hold?

A. There were a couple of tiers of Oakland pebbles in the lower part of the hold, and also some Pedro iron; above that was stowed bone-flour.

Q. What is the difference between bone-meal and bone-flour?

A. One is a finer grade than the other.

Q. What is the difference in the texture? Can you tell the difference if you look at it?

A. If I can see the two together I can tell the difference between bone-flour and bone-meal.

Q. You could?

A. Yes, sir, if both were together.

Q. What is the difference in the color?

A. Bone-meal is a little whiter; it is bleached; it is finer ground.

Q. How was that stowed in the lower hold, pretty

(Deposition of Lambert Page.)

full, or was there a pretty large space between that and the deck? Was it tight up against the upper deck, or was there a considerable space there?

A. No, sir, there was not considerable.

Q. How much was there?

A. It was stowed up to the beams; just underneath the beams.

Q. Flush with the beams?

A. Flush with the beams, more or less.

Q. That was in bags, or loose?

A. In double bags. Some of it was in double bags, I should say; some was not.

Q. It stows fairly compactly?

A. Yes, sir. [116]

Q. It makes a tight stowage? A. Yes, sir.

Q. How long before the vessel left the port of Antwerp did you complete stowing that hold?

A. The lower hold?

Q. Yes.

A. It would be about two days before.

Q. About two days before? A. Yes, sir.

Q. Now, as I understand it, that No. 1 hold was the coolest hold in the ship, was it not?

A. Yes, sir. It ought to be the coolest hold in the ship.

Q. You did everything you could to ventilate all the holds at all times? A. Yes, sir.

Q. From the beginning? A. Yes, sir.

Q. No mistakes made in the ventilation of the ship that you could avoid on that ship? A. No, sir.

Q. You took the hatches off whenever you could?

(Deposition of Lambert Page.)

A. Yes, sir.

Q. I see here all through this "ventilation of holds carefully attended to and mean temperature of holds." I see this noted, for instance, on Sunday, the 19th day of February, 199, the mean temperature of No. 5 hold is 71 degrees; what does that mean?

A. 71 degrees Fahrenheit.

Q. What does mean temperature mean?

A. The temperature is checked in the morning and also in the evening. If it was 72 in the morning and 70 in the evening, the mean temperature would be 71.

Q. How do you take that temperature, how do you determine it?

A. By the thermometer, with a line attached to it.

Q. Where do you put the thermometer?

A. Down the ventilator.

Q. Forward or aft?

A. We used to take the ventilators on the mast for No. 1 and also the ventilators just on the fore part of the bridge, and all the ventilators abaft.

Q. For No. 1 you took the ventilators on the mast?

A. Yes, sir.

Q. That is to say, you took the temperature at the point of intake, where the air was coming in? [117]

A. No, sir. We lower the thermometer down the hold to the extent of 25 feet more or less; 20 or 25.

Q. I thought you said that cargo was stowed up tight?

A. Through the sleeve of the ventilators.

Q. Then the sleeve of the ventilator is going into the lower hold? A. Yes, sir.

(Deposition of Lambert Page.)

Q. How far down does it go into the lower hold?

A. It cuts off flush with the lower deck.

Q. So that you drop it down to that point?

A. As far as it will go down.

Q. You take the temperature there?

A. Yes, sir.

Q. And take it twice a day? A. Yes, sir.

Q. Morning and night? A. Yes, sir.

Q. What time in the morning?

A. Between 6 and 7.

Q. What time at night? A. Between 4 and 5.

Q. As a matter of fact, all the between-deck spaces are above the water-line? A. Yes, sir.

Q. So that the sides of the vessel would be exposed to the sun? A. Yes, sir.

Q. Your deck top itself was an iron deck top?

A. Yes, sir.

Q. Without any wood on it? A. Yes, sir.

Q. You do not take the mean temperatures while in port when you are loading? It is only when you get out to sea that you take the temperatures?

A. Principally at sea. I do not think I took them in port. I am not quite sure. When we are in port, as a rule, all the hatches are off fore and aft, and discharging is going on, or loading. The whole time we are in port the hatches are off if it is fine weather.

Q. That is the reason you did not take the temperatures while you were in Antwerp, was it not?

A. Yes, sir.

Q. It was raining a good deal of the time there? You had to watch out for your cargo a good deal of

(Deposition of Lambert Page.)

the time? A. Yes, sir. [118]

Q. To keep it covered? A. Yes, sir.

Q. You did not think it necessary to take the temperatures there?

A. No, sir. We took the temperature of some of the cargo that we had.

Q. Were you afraid that some of it would be hot?

A. Yes, sir.

Q. What cargo were you afraid would be hot?

A. Some rags that we had, bales of rags.

Q. What else were you afraid would be hot?

A. That is about all. We used to test these bales every day before we lowered them.

Q. How about the felt?

A. The felt would not get hot.

Q. Now, between 4 and 5 cargo holds, was there any connection below?

A. In what way? Any means of passing through from one hold to another?

Q. Yes. A. No, sir.

Q. I do not imagine that you handled any of this cargo yourself; stowed any of these packages and put them in yourself, as mate? A. No, sir.

Q. That was done by the stevedores?

A. Yes, sir. We superintended it and watched it.

Q. As a matter of fact, the chief man in that is the local stevedore? He is the chief man who stows the cargo?

A. This Captain Baines, he stowed the cargo. The captain and I were also superintending the stowage of it.

(Deposition of Lambert Page.)

Q. I imagine you were there some of the time, weren't you? A. Yes, sir.

Q. When are you going to sea, Mr. Page?

A. I expect to go this evening.

Q. I notice as I look through this book that the temperature of the outside air and the temperature of the cargo seem to go up and [119] down together pretty much? A. Yes, sir.

Q. That is, they vary. If it is cold outside it is liable to be cooler in the cargo, and the reverse? That is true, is it not? A. Yes, sir.

Q. That is due to the fact that where the air and water are colder they cool the cargo, and where the air and water are warmer they warm the cargo?

A. Yes, sir.

Q. That is correct, is it not? A. Yes, sir.

Q. Are you sure you did everything you could to ventilate this No. 1 hold?

A. Everything possible.

Q. While you were loading the vessel in Antwerp?

A. Yes, sir.

Q. And between Antwerp and Hull?

A. Yes, sir.

Q. And between Hull and the Canaries?

A. Yes, sir.

Q. You kept these ventilators on and whenever you could you took the hatches off?

A. Whenever we could we took the hatches off.

Q. And kept your ventilators open all the time you could? A. Yes, sir.

Q. You got as much ventilation as you possibly

(Deposition of Lambert Page.)

could? A. Yes, sir, that was possible.

Q. How do you account for No. 1 hold being 20 degrees warmer than any other hold in the ship?

A. What hold is that?

Q. How do you account for No. 1 hold being 20 degrees warmer than any other hold in the ship?

You know what I mean? A. Yes, sir.

Q. How do you account for it?

A. I cannot very well account for it.

Q. You cannot account for it? A. No, sir.

Q. But it was, was it not?

A. I don't know that it was.

Q. This is your log, is it not?

A. Yes, sir, that is my log. I don't remember everything in it.

Q. You don't remember what occurred on the trip?

A. I know there was quite a marked difference at times, but I don't remember 20 degrees. [120]

Q. There was a marked difference for a good many days? A. For a few days.

Q. How many days? A. I could not say now.

Mr. CAMPBELL.—You can examine the log, Mr. Page.

The WITNESS.—It is so long ago.

Mr. DENMAN.—Q. Is it not an unusual thing to find one hold 20 degrees hotter than all the rest, which is the coolest hold in all the ship?

A. It is unusual for a man to remember.

Q. Would that not be a very unusual thing on your ship, when you were ventilating all the holds properly, to find one hold 20 degrees warmer than the

(Deposition of Lambert Page.)

rest? A. Yes, sir.

Q. If that did occur there, you would remember it, would you not? A. I should think I would.

Q. Don't you remember it did occur on the vessel?

A. I know there was quite a big difference. I did not know it was 20 degrees. I did not probably look at what the temperature was.

Q. What was the cause of that?

A. The only thing I can think about it is, it was in bad weather when this change occurred, and the hatches were covered up, had to be battened down. That is the only time I can think of, allowing it to run up in temperatures like that.

Q. Would not all the other hatches be battened down at the same time? A. Yes, sir.

Q. Why should this hold be 20 degrees hotter than the others? There is no explanation for it, is there?

A. No, sir, there is not.

Q. Excepting that there was something in the cargo that was heating? That is the only explanation you have for it? There was something inside heating the cargo?

A. It might have been that she was taking a little water over the fore-castle head, and would stand the after hatches being uncovered and not the forward hatches. [121]

Q. The forward hatch would very often have to be covered up on account of taking water?

A. Especially if the wind is ahead; more so than No. 2 or No. 3 or No. 4 or No. 5 hatch.

Q. That is likely to make a difference of 20 de-

(Deposition of Lambert Page.)

grees in the temperature of the holds?

A. That is likely to make a very marked change.

Q. So that when the head wind is on your fore hold is likely to be 20 degrees hotter than the other holds?

A. I would not say 20 degrees. There is likely to be a marked change in the temperature between that hold and any other hold, as it is covered up. I did not think it would be 20 degrees.

Q. That would occur whenever you had a head wind? A. A change in the temperature, yes.

Q. If you find that only occurred during the first 15 days of your voyage, and never occurred at any other time on your voyage, it would indicate it was not a head wind that was doing it, and not the shutting of the ventilators?

Mr. CAMPBELL.—Do you understand the question, Mr. Page

A. I cannot account for it.

Mr. DENMAN.—Q. It did occur in your first 15 days that the temperature went up so that it was from 15 to 20 degrees higher than the other holds, did it not?

A. I don't remember it being 10 or 15 degrees higher. I know once when the hatch was secured the temperature went up very rapidly, and when we noticed this we watched the ventilation and kept the hatches off as much as possible.

Q. When did you discover it? The first day, did you not?

(Deposition of Lambert Page.)

A. I could not say, I don't remember. It is all noted down there.

Q. You noted in here the temperatures that you took, did you not, as you went along on the voyage?

A. They are taken and put down every day.

Q. You find that in shutting up these four ventilators on account [122] of the weather it always heats up that forward hatch more than the others?

A. No, sir.

Q. You do not?

A. No more there than anywhere else.

Q. You have to shut up the four ventilators?

A. You have to shut it up more often than any other hatch.

Q. As far as ventilation is concerned, that is the poorest of all, No. 1 hatch?

A. The regular ventilation of the hold is far better. There are as many ventilators in that small space as there is in No. 2, which is the double the size of hold. There are only four ventilators down in No. 2, still we have the four ventilators of exactly the same size in a hold that is only half size, No. 1.

Q. The ventilators do not do you any good when they are shut up?

A. They do no good when they are shut up.

Q. So as a matter of fact, No. 1 hold is more likely to have rises of temperature than any other hold in the ship on account of the fact that very often when you have bad weather you have to shut up the ventilators?

A. No, sir. I should say there would be more

(Deposition of Lambert Page.)

changes in the after hold when they are covered up, liable to run up much higher.

Q. You have to cover up the ventilators on your fore hold much oftener.

A. Not the ventilators. As a rule the ventilators are turned back to the wind until the weather gets very bad indeed. It is very seldom they are ever covered up. It is only the hatches that are covered up in bad weather.

Q. I see; you almost never cover up the ventilators.

A. Very seldom; they are turned back to the wind.

Q. You testified already you kept the ventilators open from Antwerp to Hull and Hull to the Canaries? That is correct? A. Yes, sir.

Q. You did not have to cover them up between Antwerp and Hull? A. No, sir. [123]

Q. Or between Hull and the Canaries?

A. Not as far as I remember. We might have had to cover them up once or twice around Magellan Straits.

Q. That is your business, to watch out for that?

A. Yes, sir.

Q. You will swear that you kept the ventilators free between Antwerp and Hull? A. Yes, sir.

Q. And free between Hull and the Canaries?

A. Yes, sir.

Q. You also made entries in the log-book yourself, did you? A. Yes, sir.

Q. Could you have gotten any more ventilation

(Deposition of Lambert Page.)

into No. 1 between deck space than you did get between Antwerp and Hull? A. No, sir.

Q. Could you have gotten any more ventilation into that space than you did between Hull and the Canaries? A. No, sir.

Q. You did everything you could? A. Yes, sir.

Q. Everything was opened up?

A. Everything was opened up.

Q. Could you have done anything to get any more ventilation in that space than you did at Antwerp while you were lying there? A. Say that again.

Q. Could you have done anything more than you did at Antwerp to get ventilation into that space?

A. No, sir.

Q. I see that you left Antwerp on Wednesday, December 21, 1910? A. Yes, sir.

Q. I notice here you do not enter any temperature on the voyage between Antwerp and Hull. I don't suppose you took it there as it is such a short run.

A. Such a very short run.

Q. That is the reason you did not take it there; that is correct? A. Yes sir.

Q. The first temperature you took was the first day out of Hull?

A. Somewhere about the first or second day. I could not say now. I think the first day would be the day after we left Hull.

Q. I find here on that first day you took a temperature, that No. 1 [124] hold had a temperature of 101 degrees?

(Deposition of Lambert Page.)

A. That is correct. That will be correct, what is there.

Q. And the outside air at that time was 52 degrees; that is correct, is it not? A. Yes, sir.

Q. No. 2 hold had a temperature of 83 degrees?

A. Yes, sir.

Q. No. 3 hold had a temperature of 83 degrees?

Mr. CAMPBELL.—Let him see the log, Mr. Denman.

Mr. DENMAN.—Q. That is correct, is it not?

A. Yes, sir.

Q. And No. 5 hold had a temperature of 87 degrees? A. Yes, sir.

Q. And the poop 84 degrees? A. Yes, sir.

Q. Now, the next day, which was the 23d day of December, No. 1 had a temperature of 100 degrees; No. 2 is 84 degrees—you might sit over here, Mr. Page, so that you can look at the book. No. 3 had a temperature of 83 degrees; No. 4, 85 degrees; No. 5, 86 degrees; and the poop 80 degrees; that is correct?

A. Yes, sir.

Q. And the outside temperature ranged from 53 to 57; that is correct, is it not? A. Yes, sir.

Q. Now, the next day No. 1 was 101, was it not?

A. Yes, sir.

Q. No. 2 was 85, was it not? A. Yes, sir.

Q. No. 3 was 84, was it not? A. Yes, sir.

Q. No. 4 was 84, was it not? A. Yes, sir.

Q. No. 5 was 88? A. Yes, sir.

Q. And the poop was 85? A. Yes, sir.

(Deposition of Lambert Page.)

Q. And the temperatures on those days ranged from 63 to 64 outside. That is correct, is it not?

A. Yes, sir.

Q. The next day No. 1 had a temperature of 103?

A. Yes, sir.

Q. No. 2, 83? A. Yes, sir.

Q. A difference of 20 degrees? A. Yes, sir.

Q. And No. 3, 83 degrees? A. Yes, sir.

Q. No. 4, 82 degrees? A. Yes, sir.

Q. No. 5, 88 degrees? A. Yes, sir.

Q. And the poop 86 degrees?

A. Yes, sir. [125]

Q. The outside temperature was from 67 to 68?

A. Yes, sir.

Q. The next day—this was Monday, December 26th—No. 1 hold was 110 degrees? A. Yes, sir.

Q. No. 2 hold 85 degrees? A. Yes, sir.

Q. No. 3 hold 85 degrees? A. Yes, sir.

Q. No. 4, 83 degrees? A. Yes, sir.

Q. No. 5, 92 degrees? A. Yes, sir.

Q. And the poop was 87? A. Yes, sir.

Q. The outside temperature ranged from 59 to 72?

A. Yes, sir,—73.

Q. Yes, 59 to 73. That is correct, is it not?

A. Yes, sir.

Q. The next day, December 27th, No. 1 hold was 104? A. Yes, sir.

Q. No. 2, 84? A. Yes, sir.

Q. No. 3, 85? A. Yes, sir.

Q. No. 4, 85? A. Yes, sir.

Q. No. 5 is 93? A. Yes, sir.

(Deposition of Lambert Page.)

Q. And the poop 87? A. Yes, sir.

Q. And the outside temperature 60 to 62?

A. Yes, sir.

Q. Now the next day shows the temperature of No. 1 at 104, does it not? A. Yes, sir.

Q. And No. 5 at 92? A. Yes, sir.

Q. And the other holds 85? A. Yes, sir.

Q. And the outside temperature was from 61 to 64? A. Yes, sir.

Q. That is correct, is it not? A. Yes, sir.

Q. You did not take the temperature of the holds while you were in the Canaries, did you?

A. I might have taken the temperatures, but I did not enter it.

Q. You notice what I am referring to here?

A. Yes, sir.

Q. You knew that was appearing? A. Yes, sir.

Q. You know that a difference of from 20 to 25 degrees existed there? A. Yes, sir.

Q. How do you account for that? Come on and tell us. How do you [126] account for that?

Mr. CAMPBELL.—I object to the statement of counsel, saying “come on.” The witness is not refusing to testify in the case. It leaves an insinuation that the witness is trying to conceal something.

A. The only thing that I can possibly think of is the condensation occurring in the hold caused by the very cold water striking the warmth of the hull—that would not do it, either.

Mr. DENMAN.—Q. How do you account for the

(Deposition of Lambert Page.)

difference between one hold and the other?

A. I cannot account for it at all.

Q. Is there any way to account for it except that the cargo in there was heating?

A. I don't know what to think about it.

Q. When you discovered that, that it was 25 degrees warmer there—110 and 84 being the difference between the two—what did you do?

A. Kept the ventilators and hatches uncovered just as usual and turned to wind as the wind moved.

Q. Did you go down and attempt to open up your cargo so that the air could get it?

A. We opened up the hatch.

Q. When you found there was a difference of 25 degrees, and the cargo was 104, where the outside air was around 55, did you not open up your cargo to let some air in it so that it could go down below?

A. We opened up the hatch to get it down below.

Q. How can the air get freely down to below with all that cargo between the upper hatch and lower hatch?

A. There are the spaces between the beams right around the ship and also the spar ceiling, which is on the side of the ship; it is also an air passage.

Q. Is there any air passage from the between-decks down? A. No, sir.

Q. So that the only way that the air can get from the upper hatch into the lower hold is through the hatch in the between-decks? [127]

A. And the sleeves of the four ventilators.

Q. Did you shift the cargo in any way to let the

(Deposition of Lambert Page.)

air down in there when you discovered there was 25 degrees difference?

A. No, sir, I don't think we shifted any cargo.

Q. Just let it stay there with 25 degrees difference in temperature? A. We kept the hold ventilated.

Q. You had ventilated them for eight days and it still kept up. Did you not take any other precaution?

A. Not that I am aware of. We did not discharge any cargo.

Q. Did you shift any cargo? A. No, sir.

Q. You cannot account for that at all?

A. No, sir.

Q. It is a very extraordinary thing, is it not?

A. Yes, sir, it is.

Q. Did you ever have it happen before in your experience at sea?

A. No, sir, not that I can call to mind now. It might have been done in coal cargoes, but I have never seen it before in general cargo.

Q. It acted like a coal cargo when it heats?

A. Yes, sir, just the same.

Mr. CAMPBELL.—Q. Is that your answer “just the same.”

A. I dare say it is just the same.

Q. Do you know?

A. All I know is, if a coal cargo heats the temperature goes up just the same as anything else.

Mr. DENMAN.—Q. You have seen a coal cargo heat in that same way?

(Deposition of Lambert Page.)

A. I don't know about the same way; I have seen them heat up and fire, and we have had to dig down and get at the fire.

Q. You had some pretty hot weather on this voyage. A. Fairly hot weather through the Tropics.

Q. In the hottest weather no other hold got over 90 degrees in temperature on the whole voyage?

A. I don't remember the temperature. It is a long time since I wrote that log-book, not just today. [128]

Q. What was loaded in the between-deck space of cargo, No. 5.

A. This is right, as far as I can see. There was San Francisco iron in the wings, which only just covered the deck to the height of about one foot; not more than one foot, right on the after end was the sheep-dip; the baskets right in the square of the hatchway; Vancouver glass in the fore part, also San Pedro glass in the after part of the Vancouver.

Q. What is that (pointing)?

A. There was bone-meal in the wings. I remember there were a few wagons of bone-meal put there.

Q. Nowhere near as much as there was in No. 1?

A. No, sir.

Q. The great body of the bone-meal cargo was in No. 1? Your log shows that in your stowage you spent more time on No. 1 stowing that?

A. There was terrible lot of bone-meal down in No. 4. I don't know there was as much in No. 1 as in No. 4.

Q. Your own cargo plan would show that?

(Deposition of Lambert Page.)

A. Yes, sir, it would show that.

Q. We can have that this evening?

A. Yes, sir, I can get it. No. 1 is a very small hold. No. 4 hold, I dare say must be getting nearly double the size of No. 1.

Q. Of course if you had known that No. 1 was going to heat up in that way you would never have put the mineral water in there, would you?

A. No, sir.

Q. Such a temperature as that is bad for the mineral water, of course.

A. Yes, sir. Why it was stowed there was because it is the coolest part of the ship. We wanted to keep them as far as possible from the engine-room and boiler spaces.

Q. What is the distance from the fore part of the between-decks hatch here (pointing) and the bulk-head forward? How far is that?

A. I could not tell you exactly; 24 to 26 feet.

Q. As a matter of fact, is it not just 20 feet?

A. 20 feet, is it? I could not tell you. [129]

Mr. CAMPBELL.—Q. Did you ever measure it?

A. I have measured it, yes.

Q. Do you recall? A. No, sir.

Q. Don't let counsel put the answer in your mouth then. A. I am only guessing at it.

Q. I do not want any guesses, but just to tell the truth.

Mr. DENMAN.—I have no question about this witness not telling the truth. There has not been any suggestion of that kind at all.

(Deposition of Lambert Page.)

Mr. CAMPBELL.—I just want the witness to testify to what he knows.

Mr. DENMAN.—Q. How wide apart are the frames on the side of the vessel?

A. They are two feet, as a rule.

Q. How wide apart are the deck beams?

A. The deck beams are four feet as a rule; not in all cases.

Q. I know that they vary. What is the height of the deck beams above the deck; that is, what is the height of the deck beams of the upper deck above the between decks, the lower end of the deck beams?

A. Shall I say “about.”

Mr. CAMPBELL.—Q. In your judgment, what is the height of the between-deck holds?

Mr. DENMAN.—Q. In No. 1.

A. Seven feet six to eight feet I should say; seven feet six more or less.

Q. Your ship plan will show these distances, will it not? A. Yes, sir.

Mr. DENMAN.—Will you stipulate, Mr. Campbell, that the width of the vessel on a line across the forward end of the between-decks hatch is 39 feet?

Mr. CAMPBELL.—Yes.

Mr. DENMAN.—And further, that the width of the vessel at the forward end of the between-deck hold was 30 feet?

Mr. CAMPBELL.—Yes. [130]

[Deposition of J. Nelson Craven, for Respondent.]

J. NELSON CRAVEN, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. J. Nelson Craven.

Q. How old are you, Captain? A. 37.

Q. Are you the master of the “Skipton Castle”?

A. Yes, sir.

Q. Were you master of her on her recent voyage from Antwerp to San Francisco? A. Yes, sir.

Q. How long have you been going to sea?

A. Twenty years.

Q. How many years have you been master of ships? A. Eight years.

Q. In what class of vessels have you been master?

A. Eight years master of the same class I am in now.

Q. During that eight years in what ports of the world have you traded?

A. Every port; widely.

Q. Just give us an idea of what ports.

A. Antwerp, Gulf of Mexico, five years; that covers everything. Galveston, Vera Cruz, Tampico, Tampa, Port Arthur, Port Inglis, New Orleans.

Q. What other trades besides the Gulf of Mexico trade? A. In that eight years?

Q. Yes.

A. All the world trade; around the world one voyage; Pacific Steam Navigation Company, six months; West Coast of South America; Royal Mail

(Deposition of J. Nelson Craven.)

Steam Packet Company, time charter, five months.

Q. Were these all cargo carrying vessels?

A. General cargo carrying vessels, fine goods.

Q. Were you in attendance on the ship at Antwerp during the loading of this cargo?

A. Yes, sir.

Q. Where, if you know, was the mineral water stowed?

A. In the fore part No. 1 between-decks.

Q. Handing you Respondent's Exhibit "A," can you indicate to me where that was from the photograph?

A. Yes, sir; around the fore part of that ladder, extending forward.

Q. Toward the collision bulkhead?

A. Yes, sir, toward the chain locker bulkhead.

[131]

Q. And extending from side to side?

A. Extending from side to side and flush with the hatch, across the ship. That means the fore side of the ladder.

Q. On this plan, which is designated "Capacity Plan," just indicate with pen and draw a line.

A. Pen or pencil?

Q. Either one.

A. There it is (illustrating).

Q. Forward of the line marked AA?

A. Forward of the line marked AA, yes.

Q. In the section you have crosslined?

A. In the section I have crosslined.

(Deposition of J. Nelson Craven.)

Q. How was that compartment ventilated?

A. Two forecastle-head ventilators and two ventilators on the after part of the deck fitted on brackets on the mast.

Q. Again referring to Respondent's Exhibit "A," I will ask you if the two posts marked 1 and 2 are the ventilators to which you refer?

A. Yes, sir, those are the ventilators.

Q. Handing you Respondent's Exhibit "C," I will ask you if the two ventilators marked 3 and 4 are the after ventilators? A. Yes, sir.

Q. Through what opening in the ventilators does the current of air passing through them get into the between-decks compartment?

A. Through a sleeve.

Q. I will hand you Respondent's Exhibit "D," which is a drawing made by your chief officer, and ask you whether or not that correctly portrays the sleeve or opening?

A. That is it. There is a short sleeve that runs a short distance into the ventilators.

Q. Where does the continuation of that sleeve down run? A. To No. 1 lower hold.

Q. Where were the baskets stowed?

A. The baskets were stowed in No. 1 hatch and slightly inside of the wings of No. 1 hatch. That means they were stowed last, and one broken space that was left in [132] the hatches or to the wings was filled in with baskets.

Q. What was stowed in the square of the between-deck hatch? A. I could not tell you.

(Deposition of J. Nelson Craven.)

Q. What character of cargo was it?

A. It was general cargo throughout.

Q. Handing you Respondent's Exhibit "B" I call your attention to the two pipes, the ends of which are marked 1 and 2, and ask you what they are?

A. Two ventilators at the forecastle head.

Q. Are those the upper ends of the ventilators marked 1 and 2 in Respondent's Exhibit "A"?

A. Yes, sir.

Q. Were the tops of the ventilators on this voyage maintained in the same condition as they are shown in Respondent's Exhibit "D"?

A. No, sir; the tops were on. The ventilator proper was shipped.

Q. With the ventilators proper on the ventilating tubes marked 1 and 2; I will ask you whether or not the ventilator then had the same appearance as the ventilator marked A on Respondent's Exhibit "C"? A. Yes, sir, a facsimile ventilator.

Q. Now describe to us the way in which the between-deck hold No. 1 was ventilated on the voyage out there?

A. At times there were two, and mostly four hatches lifted off of the hatches. That is, there were two hatches raised at each end.

Q. I hand you Respondent's Exhibit "B," and I will ask you whether or not the spaces shown by the ink lines and marked A and B represent the position of the hatches which were removed?

A. Yes, sir, that is correct.

(Deposition of J. Nelson Craven.)

Q. During what kind of weather did you remove these hatches?

A. In fine weather wherever possible.

Q. In what way did you use the ventilators themselves?

A. In a way common to the cargo which means that you ventilate the cargo as much as possible whenever permissible.

Q. Describe to us how you would regulate those ventilators? [133]

A. Head to wind on one ventilator and back to the wind on the other, allowing a current of air to pass through them.

Q. Which of the two sets of ventilators did you customarily turn to the wind?

A. According as the weather would allow.

Mr. DENMAN.—Q. Which is the intake, the after or forward?

A. That depends on how you turn it. In fine weather the forward one is; in bad weather the after one, which means that in dirty weather the forward one would be back to the wind.

Mr. CAMPBELL.—Q. Did you turn both sets of ventilators to the wind? A. No, sir.

Q. Did you ever do that? A. No, sir.

Q. One set back to the wind, and one set facing the wind? A. Yes, sir.

Q. What was the purpose in turning them in that way?

A. Giving them ventilation; otherwise they would be opposing forces.

(Deposition of J. Nelson Craven.)

Q. What would be the effect on the air in the compartment? A. Under what circumstances?

Q. In turning one set of ventilators to the wind and one set from the wind?

A. To give a free current of ventilation.

Q. Would it have that effect on the air in the compartment? A. Yes, sir.

Q. Does the forecastle head extend over the greater part of the between deck space in which the mineral water was stowed?

A. It extends three to four feet less; it is simply a passage between them.

Q. That is the distance between the forward side of the hatch coaming and the break of the forecastle-head is about 3 feet 6?

A. 3 feet to 3 feet 6; that is rough guessing.

Q. In passing through the Tropics was there any additional protection [134] from the sun's rays provided for?

A. The forecastle-head awnings, and I am not sure whether most of that passage—I would not be certain—that there was not an awning also over No. 1 derricks. I don't know whether that is correct.

Q. Do you recall at the present moment whether it is correct or not?

A. No, sir. Something runs through my mind. The men usually sleep on that hatch in hot weather.

Q. By "that" you refer to the fore deck space?

A. Yes, sir, the fore deck space.

Q. Is that the space that was shown abaft of the forecastle-head on Respondent's Exhibit "B"?

(Deposition of J. Nelson Craven.)

A. Yes, sir.

Q. Was there any other possible means of ventilating No. 1 between-deck hold than were adopted on this voyage? A. No, sir.

Q. Is there any other hold or compartment of the ship which can be as well or better ventilated than No. 1 between-deck hold?

A. No, sir. Under normal conditions it should be the best hold in the ship.

Q. Did you see this mineral water as it was stowed?

A. I did see it after it was stowed. I did not see it stowed.

Q. Did you see it as it came out of the ship?

A. Yes, sir, I saw it as it came out of the ship.

Q. Was the stowage on arrival here broken?

A. No, sir.

Q. Was there any indication that any of the tiers of cases had been thrown down?

A. Not to my knowledge.

Q. Did you see any? A. No, sir.

Q. Did you have any complaint made to you by the stevedores? A. No, sir.

Q. Where is No. 2 hold situated with respect to the boilers? A. With respect to the boilers?

Q. Yes.

A. This is No. 2 hold (pointing). [135]

Q. Is No. 2 hold on the Capacity Plan correctly shown? A. Yes, sir.

Q. Where is No. 3 or No. 4 hold?

A. Here is No. 3 hold (pointing). We usually term it the deep tank.

(Deposition of J. Nelson Craven.)

Q. The deep tank is sometimes called No. 3?

A. Yes, sir; we usually term it the deep tank. On this plan they have it down as No. 3 hold.

Q. No. 4 hold is the hold immediately abaft of the engine-room? A. Yes, sir.

Q. No. 5 is still further up? A. Yes, sir.

Q. Through what holds does the shaft alley go?

A. The after hold and main hold, No. 4 and No. 5.

Mr. DENMAN.—Q. That is as appears on the Capacity Plan? A. Yes, sir.

Mr. CAMPBELL.—Q. Is there a ventilator in the after end of the shaft alley?

A. Yes, sir, it runs through the poop.

Q. Does any of the hot air from the engine-room and boiler-room pass through the shaft alley up the after ventilator? A. Yes, sir.

Q. What effect, in your judgment, does the presence of that shaft alley have on No. 4 and No. 5 holds?

A. A cargo that would be damaged by heat or would take on the properties of heating I should say that would have the effect of helping it.

Q. Why is that?

A. The passage of hot air through it.

Q. In your judgment do the boilers have any effect on the temperature of No. 2 hold?

A. Slightly, yes.

Q. In your judgment is it as cool a hold as No. 1 fore hold? A. No, sir.

Q. What in your judgment is the coolest cargo compartment aboard of the ship?

A. No. 1 forward between-decks.

(Deposition of J. Nelson Craven.)

Q. You had bone-meal stowed in No. 1 lower fore hold? A. Yes, sir.

Q. Did you see this bone-meal before it was loaded on the vessel? [136] A. Yes, sir.

Q. Was there anything in its appearance to indicate to you that it was liable to heat?

A. Not a thing.

Q. Was it wet by rain before it was stowed in the ship? A. No, sir.

Q. Was any of the cargo wet by the rain before it was stowed in the ship?

A. Not to my knowledge. That is a term of rejection, wet cargo.

Q. Did you see the mineral water when it was discharged here?

A. I saw parts of it, not all of it.

Q. In what condition was it? A. Bad.

Q. What was the condition?

A. Stained cases, labels gone, broken bottles, generally bad output.

Q. In your judgment in what way were the bottles broken? A. Weak bottles and bad charging.

Q. Were the bottles broken by any exterior force?

A. Not to my knowledge.

Q. To which they were subjected. Were they broken by any exterior force to which they were subjected? A. No, sir.

Q. Or by careless handling by the stevedores?

A. No, sir.

Q. Either in putting them in or putting them off?

A. No, sir.

(Deposition of J. Nelson Craven.)

Q. What season of the year did you load?

A. December.

Q. Was it cold in Antwerp at that time?

A. Cold weather, yes.

Q. Where were these bottles stored before you took them on board of your ship?

A. I have no idea.

Q. How were they delivered to your vessel, how did they come to you?

A. I have no idea. They were taken from sheds immediately alongside of the ship.

Q. Covered sheds? A. Covered sheds, yes.

Q. Similar to what we have here in San Francisco?

A. Yes, sir; covered tops and open sides.

Q. So that the sides were fully exposed to the atmosphere?

A. The sides exposed to the atmosphere. [137]

Q. In what condition were the baskets when they were discharged? A. Bad.

Q. That does not indicate anything to us. What was the actual condition? A. Mouldy.

Q. Have you ever carried baskets before?

A. Yes, sir.

Q. What has been your experience with them as to their being subject to mould?

A. At times ready to mould, if green baskets.

Q. Where have you ever carried them before?

A. Galveston, Texas.

Q. From what port? A. Antwerp shipment.

Q. How long would that voyage take you?

A. 21 days.

(Deposition of J. Nelson Craven.)

Q. In what condition have you seen them turn out on that voyage? A. Mouldy.

Q. In what condition were they turned out on this voyage? A. Mouldy.

Q. In your judgment, Captain, was there any other portion of the vessel than No. 1 fore 'tween decks where a more uniform temperature can be maintained? A. No, sir.

Q. Why not?

A. It is furthest away from the boilers; it is the smallest space with the biggest amount of ventilation, which means you can keep it at more normal heat than any other part of the ship, except No. 5 between decks which carries vibration. I could not say which has the advantage of capacity.

Q. What do you mean by vibration in No. 5 between-decks?

A. Vibration from the engine racing.

Q. In a seaway?

A. Racing in a seaway and tending to help break the bottles.

Q. Do you ever carry glassware in No. 5 hold?

A. Considerable, empty.

Q. Did you ever carry them in No. 5 hold filled with liquid? A. No, sir.

Q. Why is that? A. On account of vibration.

Q. How does the vibration in No. 4 hold compare?

A. Exactly the same; heat and vibration, in No. 4 and 5. [138]

Q. As the ship is running, in which direction does the hot air from the ship flow?

(Deposition of J. Nelson Craven.)

A. Aft, unless with a very strong following gale from abaft the engine-room aft.

Q. That is, if there is a very strong following gale the heat from the engine-room and boiler will sometimes come forward?

A. With a very strong following gale.

Q. Under any other condition which way does it go? A. Aft, over No. 4 and No. 5 holds.

Q. What effect does that have on the temperature of the holds?

A. It raises the temperature of the holds and gives a bad ventilation also.

Q. Is it as easy to ventilate the after hold by means of your ventilators as it is the forward hold?

A. No, sir; you have a passage of hot air instead of cold air, which passes through the ventilators.

Q. Where does this hot air come from?

A. From the engine-room and boilers.

Q. Up around the jacket of the smokestack?

A. No, sir, from the engine-room and boiler spaces in general.

Q. Did you take any of the temperatures yourself personally? A. No, sir.

Q. Who did that? A. The third officer.

Q. How were the temperatures taken?

A. Down the ventilators.

Q. In which hold?

A. In all the holds.

Q. The temperature was taken in No. 1 lower forehold? A. Yes, sir.

Q. In No. 2 lower forehold?

(Deposition of J. Nelson Craven.)

A. Yes, sir, in No. 2 lower forehold.

Q. And the same in 4 and 5 holds?

A. The same in 4 and 5 holds.

Q. How do you account for the higher temperature shown in No. 1 lower fore hold than No. 2 or No. 4 or 3?

A. I cannot account for it unless it is relative to these minerals waters. [139]

Q. Where are the original bills of lading which were delivered to the shipper?

A. Balfour, Guthrie & Company, so far as I know.

Q. I hand you three bills of lading and ask you whether or not they are true and correct copies of the original bills of lading which were given to the shippers of cargo of the goods therein specified? (Handing.)

A. The goods I cannot swear to. I do not know this particular consignment. These are our bills of lading.

Q. These are not originals, are they?

A. No, sir, they are copies.

Mr. DENMAN.—If you will put in one of those bills I will stipulate that all of those goods in the libel were shipped on similar bills.

Mr. CAMPBELL.—I do not know whether they were or not.

Mr. DENMAN.—I have copies of the bills in my office. They are all apparently like that.

Mr. CAMPBELL.—Have you the original bills?

Mr. DENMAN.—I have them in my office, all except one which is in the custom-house.

(Deposition of J. Nelson Craven.)

Mr. CAMPBELL.—Were they not delivered to the ship on the receipt of the goods.

Mr. DENMAN.—Maybe we have duplicate copies. There will not be any question about all the goods we libel for being under these bills of lading.

Q. Did you sign the bills, Captain? A. No, sir.

Mr. CAMPBELL.—Q. By whom were they signed? A. Jones & Company, Antwerp.

Q. Who were Jones & Company?

A. The representatives of the ship in this case, with authority to sign all the bills of lading.

Q. They were the agents who gathered the cargo?

A. The brokers of the cargo.

Q. What effect, if any, does the temperature of the water through [140] which the ship passes have upon the holds of the ship? A. In what way.

Q. Does it tend to raise or lower the temperature of the holds as the temperature of the water is higher or lower?

A. Does that mean whether the upper or lower part of the holds below the water-line is affected by water temperature?

Q. I think my question is plain. Just read the question, Mr. Reporter, and listen to it, Captain.

(The reporter reads the question.)

A. Yes, sir.

Q. In other words, what effect upon the temperature of the holds of the vessel does the temperature of the water through which the vessel is passing have?

A. They follow to a certain degree the temperature of the water.

(Deposition of J. Nelson Craven.)

Q. Is that true of the between-deck compartments?

A. Less than below her water-line.

Q. In which of the holds, the lower hold or the between-deck hold, is a more uniform temperature?

A. In her between-deck hold.

Q. If you were to return to Antwerp and bring out another cargo of the same character as this one, would you alter the stowage of the mineral waters?

A. No. 1 between-decks fore parts.

Q. Would you change the stowage from what it was on this voyage? A. No, sir.

Q. In your judgment is there any other place in the ship in which they can be stowed as well as they could be in No. 1 fore between-decks?

A. No, sir.

A. Why is that?

A. It maintains an even temperature, as even as you can get it in a ship's hold.

Cross-examination.

Mr. DENMAN.—Q. Captain, this Capacity Plan is drawn to a scale of 1/16th of an inch to a foot, is it not? A. Yes, sir. [141]

Q. Let me ask you, what precautions do you take on the side of the vessel to prevent sweat from getting at the cargo? A. Dunnage wood.

Q. Put in papers or anything of that kind?

A. In this case I could not say whether it was matted or not. The steamer, in general, was matted besides dunnaged.

Q. That is true of the lower holds as well as the upper ones? A. Yes, sir.

(Deposition of J. Nelson Craven.)

Q. As between No. 5 after hold and No. 4 after hold, is there any choice as to which is the cooler?

A. No. 5, if anything.

Q. Would be the cooler? A. If anything.

Q. You say that this cargo was lying in sheds alongside of the vessel? A. Yes, sir.

Q. What was the color of the bags of bone-meal?

A. Dirty white.

Q. Did you have any occasion to examine them yourself, personally?

A. Not beyond passing them all the time.

Q. When you say they were damp or dry, you do not know of your own knowledge?

A. Yes, sir, to a certain extent. If a shower of rain gets on a bone-meal bag it immediately spots.

Q. These were dirty bags any way?

A. Yes, sir. That does not alter the fact that a spot of rain hitting a bag, it shows a spot.

Q. Suppose they were generally damp by the moist condition of the air at that time?

A. That I could not tell you.

Q. As a matter of fact, you did not touch any of the bags? A. I did not touch them.

Q. They were piled in piles, thousands of them?

A. Yes, sir.

Q. They might have been wet inside without your knowing it?

A. It is possible, but not likely.

Q. You cannot tell whether they came in on cars that were wet or anything of the kind?

A. Yes, sir, you could tell if they came in a wet car;

(Deposition of J. Nelson Craven.)

you could not tell if in a damp car. [142]

Q. You did not see them come in cars?

A. No, sir.

Q. You had no occasion to examine the sacks?

A. I had no occasion to examine the sacks.

Q. You do not know what the condition was?

A. A general condition, yes.

Q. You do not know.

A. A minute examination, no.

Q. That is not your business? A. No, sir.

Q. It is the mate's business, is it not?

A. It is everybody's business in the ship. It refers to me more than the mate.

Q. Does not the mate attend to the stowage of the cargo?

A. The stowage in this case was more under me than anyone.

Q. It was?

A. Yes, sir; the mate works under my instructions.

Q. Why do you want to put willow-ware in a hold that has an even temperature?

A. You put all cargo in a hold with the best temperature you can get, irrespective of willow-ware?

Q. When you were speaking of stowage in that forward hold, you were speaking of stowage of that mineral water. When you said that you picked No. 1 hold for mineral water, you had particularly in mind— A. Mineral water, yes.

Q. They are subject to some breakage from heat any way? A. Not in general.

Q. Don't you have a certain amount of breakage

(Deposition of J. Nelson Craven.)

in all mineral water that comes on voyages of this kind, a certain per cent of breakage in all of it?

A. Very small; and the result of that breakage goes to the bottom; it does not strike upwards as this has done.

Q. Why then were you so anxious to get it in No. 1 forward hold? A. Preservation of the cargo.

Q. Why do you want to put mineral water up there instead of anything else?

A. Because it is the best temperature for it.

Q. It is more likely to blow up than any other cargo? [143]

A. It takes more delicate care than other cargo.

Q. You mean by that that it is more likely to break under changes of temperature; is that it?

A. Yes, sir; more likely to break under changes of temperature.

Q. How did you sound the between-decks?

A. On one or two occasions I myself tested the between-decks with a thermometer.

Q. Suppose you get liquid in there, how do you sound it?

A. Only down the hatchway. There is no means of sounding the between-decks.

Mr. CAMPBELL.—Q. I will ask you if you meant to sound them to see if there is water there?

A. No, sir.

Mr. DENMAN.—Q. You have no sounding pipes through that way?

A. Not to the between-decks.

Q. How were the between-decks drained?

(Deposition of J. Nelson Craven.)

A. As far as I know in this case, there was no drainage to take effect.

Q. How would they be drained?

A. Down in the after part of the hold.

Q. Is there a connection between the two?

A. I believe there is. I am not quite certain.

Q. Does not the hatch coaming come up on all the hatches between the between-decks and the lower hold? A. Yes, sir.

Q. So that if you get liquid in the between-decks, there is no way of its getting out, is there?

A. No, sir.

Q. You have not got any pumps on the between-decks, have you? A. No, sir.

Q. These deck beams run from side to side, don't they? A. Yes, sir.

Q. And the frames are attached to them?

A. The frames are attached to them.

Q. Now, as a matter of fact, neither you nor the mate opened any of these cases that were taken off of the ship? A. No, sir. [144]

Q. So that your bad charging and weak bottle business is a theory of yours?

A. It is the only theory I can get at.

Q. How do you account for the high temperature of No. 5 hold? A. I cannot account for it.

Q. There is no mineral water in that, is there?

A. I could not tell you that.

Q. There was a high temperature there?

A. I could not tell you that without looking at my log-book.

(Deposition of J. Nelson Craven.)

Q. Don't you remember there was a high temperature there? A. No, sir.

Q. Don't you know, as a matter of fact, that all of the baskets you took out of No. 2 hold had no mould on them at all?

A. I could not tell you if there was any in No. 2.

Q. Don't you know all the baskets that were discharged in San Pedro had no mould on them?

A. No, sir.

Q. Did you not watch them as they came out?

A. No, sir, I did not watch them.

Q. Why did you not do that when you are so careful about the cargo coming in?

A. I don't remember there were any baskets in No. 2 hold. I have an idea there were not.

Q. Were there baskets in any other hold?

A. Yes, sir, No. 5.

Q. Any mould on them?

A. I could not swear to that.

Q. They were San Pedro baskets, were they not?

A. I believe there were some for San Francisco. I could not swear to that again.

Q. You principally had charge of putting on the cargo rather than the mate?

A. The mate was working under my direction.

Q. Were you around there yourself?

A. I was part of the time, assisted by a surveyor.

Q. Assisted by a surveyor? A. Yes, sir.

Q. When you say that none of those mineral water cases were broken by careless handling, how can you

(Deposition of J. Nelson Craven.)

say that? They are put in by a stevedore who checks them in one by one?

A. Watched by an officer. [145]

Q. You did not stand there and watch them?

A. Not personally.

Q. You do not know positively that they were broken by carelessness?

A. My officers reported them—

Q. Answer the question. You do not know personally? A. No, sir. I do not know personally.

Q. This charged mineral water such as you have here is liable to vibration over the wheel?

A. Over the wheel, yes.

Q. That is more likely to make them break?

A. It would have that tendency.

Q. That is the reason they are put forward?

A. That is the reason they are put forward.

Q. The between-decks are above the water-line, are they not? A. Yes, sir.

Q. Pretty well up above it? A. Yes, sir.

Q. Take No. 2 main between-decks; what have you got in your cross-bunker there in front of your boiler and engine space? A. Coal.

Q. What do you put in No. 3 deep tank hold?

A. The bottom was stowed with sand dunnaged with matting, and stowed with case goods on top.

Q. Case goods means bottles of liquors.

A. It was liquors in this case, put down there for safety, so that they could not get at it.

Q. Is that an awfully warm place?

(Deposition of J. Nelson Craven.)

A. No, sir. That is, during the stowage; taken off when we go to sea.

Q. Is that not an awfully warn place to put case goods?

A. Not liquors. They are not liable to breakage from heat, spirits.

Q. Are they not liable to injury by heat?

A. No, sir, I don't think so.

Mr. CAMPBELL.—Is there any claim for damage on liquors?

Mr. DENMAN.—I am examining this man as an expert on stowage.

Mr. CAMPBELL.—I am asking you whether or not there is any claim for damage on liquors. [146]

Mr. DENMAN.—Not in this libel.

Q. Do you think No. 3 deep tank hold was more likely to heat up and have changes of temperature than No. 1? A. Considerably.

Q. What will make the change of temperature there?

A. The heat from the bulkhead, from the boiler-room.

Q. That heat did not show up during the voyage?

A. Not abnormally.

Q. That did not show up above the other holds?

A. That I could not tell you without looking at my log-book.

Q. You watch these log entries day by day, don't you? A. Yes, sir.

Q. Now, you have a good deal of rain, don't you,

(Deposition of J. Nelson Craven.)
in Antwerp while you are loading?

A. Not while we were loading. There was rain while we were there; not in actual loading.

Q. You kept the hatches covered?

A. During rain.

Q. You keep the hatches covered during the rainy period?

A. We keep the hatches covered during the rainy period.

Q. And they are covered at night, too?

A. They were working a great deal of the night.

Q. When it was raining they were covered?

A. When it was raining they were covered, night and day.

Q. Do you get much ventilation in any ship through the ventilators when lying in port?

A. Not what they get at sea. It is the movement of the vessel that causes the draught. At sea they work downtake and uptake; in port they work simply as an uptake.

Q. Letting out the heat inside?

A. Yes, sir. There is a breeze, of course.

Q. Now, Captain, when you were not working the holds at night. were the hatches on or off?

A. On and covered.

Q. That is, in port? A. In port.

Q. That was always the case, was it not?

A. Yes, sir.

Q. Has your boatswain reported back to the ship yet?

(Deposition of J. Nelson Craven.)

A. He went on board drunk just before she left the wharf. [147]

Q. When did you discover that he was drunk?

A. I could not tell you.

Q. He was drunk this morning?

A. I could not tell you.

Mr. CAMPBELL.—Q. Did not the mate report to you in your cabin this morning when I was present, when we sent out for the boatswain, that he was intoxicated? A. Yes, sir.

Mr. DENMAN.—Q. He was on board then?

A. He was forward, but I did not see him personally. To-night I saw him going aboard. I did not see him this morning, and I could not say whether he was drunk or not.

Mr. CAMPBELL.—Q. The mate would know. He saw him.

A. The mate reported to me. I did not see him myself.

Mr. DENMAN.—Q. What did you do when you found there was 25 degrees difference in temperature? A. I could not do anything.

Q. Could you not have taken any cargo out and gone down?

A. There was no place to take cargo out.

Mr. CAMPBELL.—What date was that, Mr. Denman?

Mr. DENMAN.—It was on the 30th of December.

Q. Did you ever have that happen before?

A. Heating?

Q. Yes. A. No, sir.

(Deposition of J. Nelson Craven.)

Redirect Examination.

Mr. CAMPBELL.—Q. Was it possible for you, Captain, to get into any of the lower holds of your vessel while they were filled with cargo for the purpose of restowing it?

A. No, sir, absolutely not, without jettisoning the cargo.

Q. Did any sea water get into your ship on this voyage? A. No, sir.

Q. Did she leak in any of her holds?

A. No, sir.

Q. Who was the surveyor in charge of the loading of this cargo?

A. Assisting me? Captain Baines of Antwerp.

Q. Do you know how long he has been engaged in that business? [148]

A. I cannot tell you that. He is a man of considerable years; probably the better part of 60 years, who has been at it for some years; how long, I cannot tell you. He is an expert on cargo stowage.

Recross-examination.

Mr. DENMAN.—Q. Did you turn your hose into No. 1 hold?

A. No, sir. I had no reason to turn the hose into No. 1.

Q. Not with heating there?

A. Not firing; heating but not firing.

Q. It would not have been good policy to turn the hose in?

A. I had no reason to turn it in.

(Deposition of J. Nelson Craven.)

Q. There was nothing there to indicate that you should do that, was there? A. No, sir.

Q. As a matter of fact you did all you could to better that condition when you found it hot there?

A. We could not better the condition that the hold was in, free ventilation.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Is it customary for cargo ships to have pumps to relieve the between-decks?

A. No, sir, in no case.

Further Recross-examination.

Mr. DENMAN.—Q. Is it not a general rule that all compartments of a ship should either have pumps or drains?

A. Drains; drains in the after part of the between-decks; there are scuppers in the after part of the between-decks.

Q. There were scuppers? A. Yes, sir.

Q. Then any liquor that got in would run out?

A. The liquor that was in there would run down to No. 1 bilges.

Q. Did the liquor show up in No. 1 bilges?

A. No, sir.

Q. Have you got your sounding-book here?

A. No, sir.

Q. Did any liquid show up?

A. No, sir. There is always a certain amount of drainage in all holds every day, with or without cargo. [149]

(Deposition of J. Nelson Craven.)

Mr. CAMPBELL.—I will offer in evidence at this time the exhibits marked Respondent's Exhibits "A," "B," "C," "D" and "E."

Mr. DENMAN.—Q. This stowage plan *in* correct (handing) ?

A. As far as I have gone through it.

Q. Regarding this hold ?

A. Regarding this hold, yes.

Q. That is correct ? A. Yes, sir.

Mr. CAMPBELL.—Q. That is No. 1 between-decks hold ?

A. Yes, sir, No. 1 between-decks hold; that is correct. There is only one thing, he has minerals coming into the hatch slightly, perhaps a foot. That is not correct.

Q. Who made that ?

A. The chief officer made that.

Mr. DENMAN.—Q. How about the wings alongside ?

A. The wings were stowed with felt, and over-stowed with baskets where possible.

Q. Why was that not put in the plan ?

A. That is a thing you cannot put in the plan, the wings, without you put a face plan. The plan was made to guide the officers where the different consignments of cargo were put relative to ports.

Mr. CAMPBELL.—Q. Of discharge ?

A. Yes, sir. They are colored for their benefit.

**[Deposition of Lambert Page, for Respondent
(Recalled)].**

LAMBERT PAGE, recalled for the respondent.

Mr. CAMPBELL.—Q. I will ask you to look at your log and state whether or not that is in your handwriting (Handing)? A. Yes, sir.

Q. Did you make up the log? A. Yes, sir.

Q. And are the facts therein stated true?

A. Yes, sir.

Q. Is that your signature at the bottom of each page?

A. That is my signature at the bottom of each page.

Q. Look at the temperatures that you have marked on each page. You give the temperatures for what holds? A. Nos. 1, 2, 3, 4 and 5. [150]

Q. What No. 1 hold was the temperature taken from? A. The lower hold.

Q. Was that the temperature of No. 1 between-decks hold? Was that temperature taken from No. 1 between-decks hold, or No. 1 lower hold?

A. No. 1 lower hold.

Q. Is it the temperature of No. 1 between-decks hold?

A. No, sir, it is not the temperature of No. 1 between-decks hold.

Q. Did you take the temperature of No. 1 between-decks hold?

A. Personally, no. The third officer did.

(Deposition of Lambert Page.)

Q. Is the temperature of No. 1 between-decks hold shown in the log?

A. No, sir, I cannot say that it is. It was taken down through the ventilator into the lower sleeve.

Q. At the lower end of the ventilator?

A. At the bottom end of the ventilator, as far as the thermometer would go down.

Q. In what hold would that be? A. In all holds.

Q. In what hold would that be?

A. It would be in the lower hold.

Q. In your judgment was the ventilation that was given No. 1 between-decks hold, would the temperature be as high as it was in No. 1 lower hold as indicated by the log?

A. I should say that the temperature of the lower hold would be much different to the between-decks.

Q. Which would be the higher? Which hold would be the cooler hold in your judgment? In your judgment would the lower hold or the between-decks hold be the cooler or hotter? Which?

A. When the water is at a very low temperature I should say that the lower hold would be cooler than the other. If the sun was very hot during the day it would be vice versa. If the hatches were covered up in bad weather, I should say that the lower hold would be the warmest.

Q. Do you know what the temperature of the No. 1 between-decks was at the times indicated on the log of the temperature of the [151] lower hold?

A. It could not have been much different than the

(Deposition of Lambert Page.)

lower hold, I should say.

Q. Did No. 1 lower hold get the same ventilation as No. 1 between-decks did?

A. The between-decks got more ventilation.

Q. What effect would that have on the temperature, raise it or lower it? A. It would lower it.

Q. How often did you have No. 1 main hatch off?

A. We had them off every day with the exception of the days it was very bad weather, when it was impossible to take them off without getting water down the hold.

Q. In your judgment did that assist in giving No. 1 between-decks a freer ventilation? A. Yes, sir.

Q. What effect would that have on the temperature of the hold, to cool it? A. To cool it.

Q. Was this cargo wet by rain when it was put into the ship? A. No, sir.

Q. Were the hatches covered at night?

A. Yes, sir, they were covered at night.

Q. Was there any water taken into the hold of the ship by the sea water on the voyage? Did your ship leak?

A. No, sir, she did not leak. I cannot say there was any water taken down at all.

Q. Did you see this bone-meal when it was loaded?

A. Yes, sir, I see the bone-meal.

Q. What condition was it in?

A. In apparently good condition.

Q. Was it damp or wet? A. No, sir.

Q. Did you handle any of the sacks yourself?

(Deposition of Lambert Page.)

A. Yes, sir.

Mr. DENMAN.—He said he did not in his direct examination.

Mr. CAMPBELL.—He did not say that.

Mr. DENMAN.—Q. I asked you if you touched any of the cargo yourself.

A. The question you asked me, if I may interrupt, was did I handle the cargo. You meant to say, as I understood it, did I [152] load any of the cargo myself. I went around and looked at all the cargo as it came in the ship, when it was on the quay.

Mr. CAMPBELL.—Q. Did you examine it

A. Yes, sir, I examined practically all the cargo, everything that was taken in.

Q. In what condition did you find this bone-meal that was taken in No. 1 lower hold?

A. In apparently good condition.

Q. Was it wet? A. No, sir.

Q. In your judgment, could No. 1 between-decks hold be given any better ventilation than it was given on this voyage? A. No, sir, that is impossible.

Q. Was it possible to give any compartment as good ventilation as you gave No. 1 between-decks?

A. Yes, sir. It was possible to give the other hold as much ventilation as you could give No. 1.

Q. Which other hold? A. All the other holds.

Q. The lower hold too? A. Yes, sir.

Q. How would you do it?

A. By taking off the hatches and keeping the ventilators trimmed to wind.

(Deposition of Lambert Page.)

Q. Would the hatches removed from the main deck permit ingress of air into the lower hold?

A. Yes, sir.

Q. How? A. By just taking them off.

Q. How would the air get into the lower hold through the main deck hatch?

A. We never cover them up with tarpaulins, the lower deck hatches. We just put a few hatches across to separate the cargo and leave spaces between for ventilation.

Q. Was there anything in the bone-meal as you took it aboard of the ship to indicate that it was liable to heat? A. No, sir.

Q. Did any rain get into the lower hold after the bone-meal was stowed? A. No, sir.

Q. During the course of the voyage when you had your hatches open was any water taken in through them? [153]

A. No, sir, not that I am aware of. There was none seen. The hatches during bad weather were always covered up and secured with three tarpaulins.

Q. I will ask you to examine this book which seems to be the cargo stowage plan and ask you who made it (handing). A. I made it.

Q. When did you make it?

A. I made it during the time we were in Antwerp and immediately after leaving there from notes that I kept.

Q. Is it a correct plan of the stowage?

A. Yes, sir, it is a correct plan of the stowage.

(Deposition of Lambert Page.)

Q. Does it indicate the position with respect to the center of the hold and the wings of the hold where cargo was stowed? A. Fairly well.

Q. Referring to No. 1 between-deck hold I will ask you to interpret the stowage plan.

A. In the fore part of the between-decks mineral water was stowed.

Q. Is that shown on the plan? A. Yes, sir.

Q. How is that marked on the stowage plan?

A. It is marked "right across the ship."

Q. What color.

A. It is green. The red writing is for the port stowage. The black writing is for amidships stowage, and the green for starboard stowage.

Q. What does the color plan show as to the stowage in the middle portion of No. 1 between-decks?

A. San Pedro general and San Pedro baskets in general.

Q. What was stowed in the port wings?

A. In the wing San Pedro general.

Q. Interpret that as you interpreted the first. What was the port stowage and what was the wing stowage?

A. The port stowage was general and baskets. Amidships stowage in the hatchway was baskets. On the starboard side was San Pedro general. [154]

Q. What was the after end, in the same way?

A. The after end was Frisco barrels, the wool grease, and Frisco baskets.

Q. Had you any reason to believe when you stowed

(Deposition of Lambert Page.)

the bone-meal in No. 1 hold that it would be liable to heat? A. No, sir.

Cross-examination.

Mr. DENMAN.—Q. The pebbles came alongside of the vessel in lighters? A. Yes, sir.

Q. They were uncovered, were they not?

A. I don't know. They were all stowed in bags.

Q. There was no reason to cover the pebbles, was there?

A. As a rule those lighters are always covered in the hatchways.

Q. I am talking about when they came alongside in lighters.

A. I don't know if they were covered when they came alongside or not.

Q. They might have been wet. You put those on the bottom always because you want the drainage at the bottom; is that not the proper stowage of pebbles?

A. We should not put them in wet if we were going to take in cargo that was perishable, put it over the top.

Q. They came alongside of the vessel in open lighters?

A. No, sir, there were no open lighters. They have got hatches right across the lighters fore and aft, and covered with only tarpaulins. They cannot go around Antwerp and around the river Skelt without tarpaulins.

Q. Even with pebbles?

(Deposition of Lambert Page.)

A. Not even with pebbles.

Q. Is it not a fact that a very large portion of coke comes in lighters and is taken off without tarpaulins, over it? No, sir.

Q. You never saw that?

A. No, sir, I never saw it, never.

Q. You felt all those pebble bags to see if they were dry or not? [155]

A. No, sir.

Q. You felt all the bone-meal bags to see if they were or not?

A. No, sir, but I walked over a portion of them and had my hand on a number of them.

Q. What made you put your hand on them?

A. Just knocking about the wharf, probably leaning on them looking after other things going in, and I was covered with bone-meal, knocking around on the wharf, when it was taken off in the carts and stored in the shed.

Q. What does bone-meal smell like?

A. I cannot say there is any smell. I have not got a very sensitive smell at any time.

Q. Has it any odor?

A. Not that I am aware of. I could feel it on my chest, a pain in my chest.

Q. You do not mean to say you cannot smell any odor in bone-meal? A. Nothing to speak of, no.

Q. That bone-meal was there in open sheds?

A. No, sir, covered sheds.

Q. They were open at the sides?

A. They were open at the sides.

(Deposition of Lambert Page.)

Q. You had a great deal of rain and misty weather? A. Misty weather?

Q. Rainy weather? A. Yes, sir.

Q. The rain could have beaten in on the bone-meal very easily, could it not? A. No, sir.

Q. Why not?

A. Because the breadth of the shed would be 300 or 400 feet; the roof of the shed would be 300 or 400 feet I meant to say. This is all stowed well back to allow the carts to come alongside, and wagons, and discharge their cargo.

Q. How were the pebbles got on the ship?

A. How were they got on?

Q. Yes, how did you get them out of the lighters on to the ship?

A. I think it was iron tubs they were brought aboard in—no, it was not; it was wooden troughs that they were taken in.

Q. How did you prevent the sweat of the sides getting on the bone-meal and bone flour?

A. The spar ceiling prevented it. We had it matted all down. The spar ceiling leaves an air space of about five inches between the ship and the cargo. [156]

Q. Inside of that you had this matting?

A. Matting right down the side.

Q. That prevented the moisture getting on the bone-meal, is that it? A. Yes, sir.

Q. That did not run clear up the side of the vessel to the between-deck beams, did it?

A. Right up to the decks, yes.

(Deposition of Lambert Page.)

Q. So there was no chance for the sweat to get from the sides on to the bone-meal at all, the matting prevented that, did it? A. No, sir.

Q. The matting prevented any sweat getting from the sides of the ship in on to the bone-meal, is that it?

A. If the ship's sides sweat at all it would run down the vessel's side, but condensation may occur between the matting and the ship's side.

Q. Your idea is that the mats ran right up to the deck and prevented any moisture coming from the ship's side into the bone-meal; is that correct?

A. The mats are not air-tight or damp-proof. It is good protection.

Q. Protection from what?

A. From touching any iron or wood or anything around the ship's side.

Q. You put those close together so that the moisture cannot come through, don't you—or do you?

A. Not to prevent moisture from coming through but to keep them from touching anything that is likely to sweat. The mats are very porous. There is plenty of air that could get through the mats.

Q. If there was moisture in there it would reach the bone-meal then?

A. If there was moisture between the ship's side and the mats, it is more likely to cause a sweat on the ship's side on the iron and run down in the bilges.

Q. That would make moist air in there, would it not?

A. Yes, sir; the air would be a little damp I sup-

(Deposition of Lambert Page.)

pose. It would not be dry air. [157]

Q. How long was the bone-meal on the deck before you took it on board, that you know of?

A. As the bone-meal came down it was loaded.

Q. It was? A. Yes, sir.

Q. Where did it come from, do you know?

A. No, sir.

Q. Could any moisture get up from the bilges through the scuppers into the between-decks?

A. No, sir.

Q. Why not?

A. It is not likely to force its way up through a pipe which would be about an inch and a half in diameter up as much as twenty feet or more.

Q. Don't you think you ought to have had those scuppers covered?

A. No, sir; they should not be covered.

Q. They should not be covered? A. No, sir.

Q. They were not covered on this trip?

A. No, sir.

Q. Any drainage from those bottles would run down the scuppers?

A. It would run down the scuppers into the bilges.

Q. Those scuppers are in the after end, are they?

A. Yes, sir.

Q. There is no pitch from the forward end of No. 1 between-decks back to the scuppers, or is there a pitch back of the deck there?

A. Any water that is likely to come away from the cases of mineral water on the fore part would run aft.

(Deposition of Lambert Page.)

Q. Why? A. Because there is an incline.

Q. An incline of the deck?

A. Yes, sir, running aft.

Q. Your deck plan shows that these baskets that came to San Francisco were stowed in the after portion of the No. 1 hold at the top of the hold, weren't they; in the after end of No. 1 hold near the top?

A. Yes, sir.

Q. And that is where the ventilators open into, No. 1 hold, is it not?

A. Yes, sir. The after ventilators?

Q. Yes. A. Yes, sir.

Q. And those are the intake ventilators, whenever you can make [158] them? A. Yes, sir.

Q. These were the baskets that came out injured and mildewed? A. Yes, sir.

Q. It was only the baskets in the hold with the mineral water that were injured on this trip?

A. Yes, sir.

Q. The baskets in the other hold came out all right, didn't they? A. Yes, sir.

Q. Did you have any mineral water stowed in after hold No. 5? Does your plan show any there?

A. No, sir.

Q. As a matter of fact, you would not have stowed it in No. 5 on account of the vibration?

A. Vibration was one thing, and a warmer hold.

Q. That is, you think the heat of the engines will go backward rather than forward? A. Yes, sir.

Q. No. 4 would be the warmer and No. 5 less warm? A. Yes, sir.

(Deposition of Lambert Page.)

Redirect Examination.

Mr. CAMPBELL.—Q. Every ship's hold is subject to more or less sweat in condensation, is it not?

A. Yes, sir.

Q. Is it possible to absolutely prevent it?

A. No, sir.

Q. Did you see these pebbles when they were taken in?

A. I saw the pebbles after they were taken in; some of them, not all.

Q. Were they wet? A. No, sir.

Q. You say they were in sacks?

A. Yes, sir, small bags.

Q. Was there anything to indicate that they were wet? A. No, sir.

Q. Do you know where they had been secured?

A. Yes, sir; some of them. Where they were secured?

Q. Where they came from? A. No, sir.

Q. Did you take them into the ship's hold during rainy weather so that they were wet while they were being transferred from the lighter to the ship?

A. No, sir.

Q. Were they rained upon after they were in the hold? A. No, sir. [159]

Mr. CAMPBELL.—I will offer in evidence the mate's stowage plan as Respondent's Exhibit "F."

Mr. DENMAN.—I will offer in evidence the log as Libellant's Exhibit 1.

Recross-examination.

Mr. DENMAN.—Q. This cargo plan is made up

(Deposition of Lambert Page.)

by making your notes from day to day as you go along? A. Yes, sir.

Q. And then after you get aboard of the ship you check everything up and make up the plan, on page D from those notes? A. Yes, sir.

Q. The notes from which the plan has been made appear in this same cargo book, don't they?

A. Yes, sir.

Q. There was some enamel ware, quite a considerable quantity of enamel ware, in hold No. 1, was there not?

A. If there was, it would be here in the between-decks with that general.

Q. Your notes show that, do they not, that there was?

A. These notes that I have at the back here are not taken from the cargo as it was loaded. They were taken from the stevedore's receipts to check mine, to see how it corresponded with mine after we got to sea from the receipts I got from the stevedore stating all that is mentioned. On each receipt that was signed the stevedore always made a footnote of what hold it was supposed to be stowed in. They were not always correct; sometimes the stowage would be altered during the day when other cargo came down. In the morning they would be loading and a large shipment may turn up and they would alter the stowage of the cargo and take in the shipment probably that turned up.

Mr. CAMPBELL.—Q. So that their receipts would not necessarily be correct? A. No, sir.

(Deposition of Lambert Page.)

Mr. DENMAN.—Q. Is this correct here, with regard to the stowage of enamel ware?

A. I don't remember of any enamel ware. There was general goods in the between-decks. [160]

Q. Where was the enamel stowed on the ship?

A. I guess it is in the general.

Q. Then it is that general cargo?

A. There may be some there. I don't remember personally any enamel ware amongst the general, if it was there.

Q. Where was the enamel ware on the vessel?

A. I don't know if I have any down here in this plan or not. I think I have got it stated as general.

Q. Then, if the stowage shows enamel ware in No. 1 hold, it is not likely it was put in any other hold, is it?

A. Yes, sir, it is very likely. Still, I daresay there was some down there.

Mr. CAMPBELL.—Q. Do you know? Have you any recollection whether there was or not?

A. No, sir. All I could say is there was general. I could not say there was enamel ware.

Q. Did you open every package to see what was contained in it? A. I never opened one package.

Mr. DENMAN.—Q. Let me look over this to see if you have got any enamel ware.

Mr. CAMPBELL.—What is the purpose of the question? To test the veracity of the witness?

Mr. DENMAN.—No. I have some enamel ware in my claim.

Mr. CAMPBELL.—You have not specified it in the present libel.

(Deposition of Lambert Page.)

Mr. DENMAN.—It is claimed for in the libel under the heading of merchandise following the bill of lading.

Q. All of these holds had the same open hatches between the lower hold and the upper hold for ventilation? A. Yes, sir.

Q. All the holds are stowed in that way?

A. Yes, sir.

Q. I believe you said you did not see all these pebbles come alongside of the ship; only some of them?

A. That is all.

Q. How do you indicate here what holds the packages were in; what shows the holds?

A. There is nothing to show which holds they are in. [161]

Q. What is this (pointing)?

A. That is some notes made from the stevedore's receipts after we get to sea.

Q. How are you able to make up your cargo plan of those 210 cases of enamel ware?

A. That has been put down as general. I have not specified that in the plan at all. It is put down as general.

Q. How are you to make up from this your plan over here?

A. From this (pointing)?

Q. Yes. A. I do not make it up from this at all.

Mr. CAMPBELL.—Q. When you say "this" you are referring to the cargo plan-book?

A. Yes. I do not understand.

Mr. DENMAN.—I will straighten it out.

(Deposition of Lambert Page.)

Q. As I understand it, this plan on page D is made up after you have gotten to sea from the notes you have taken during the loading of the vessel?

A. Yes, sir, from the notes I have taken during the loading. I have always carried a plan around with me, a rough plan.

Q. Where is the rough plan you made?

A. I have not got it here. I might have it on board. I daresay I have.

Q. This is not the original cargo plan, but the one that is made up afterwards?

A. You cannot go around amongst the cargo with your hands dirty all the time; you cannot keep your hands clean on board of the ship and keep a decent plan. After the work is finished of an evening you fill up a decent plan then, a plan that people will be able to look at.

Q. Where was your oxalic acid on this vessel?

A. I believe some of it was in No. 5 between-decks in the after hatch, but I am not sure.

Q. That was in the San Pedro cargo, was it not?

A. I think it was San Pedro. I don't know.

Q. As a matter of fact there was some in No. 1.

A. Oxalic acid? [162]

Q. Yes. A. No, sir, I don't think there was.

Q. Was it not in that general cargo in No. 1?

A. That would not be put down as general cargo.

Q. Just find out where that is.

A. This would be where it is (pointing). In there and in the poop, too.

Q. Any leakage in there? A. No, sir.

(Deposition of Lambert Page.)

Q. It came through all right, did it?

A. It came through all right. Anything that is in drums will not be mentioned as general.

Q. Let me see that plan of the drawing of the ventilators. What did you say was the space between that sleeve and that (pointing)?

A. Three to four inches, I should say.

Q. Four, is it not?

A. About that; three to four inches; yes, about four inches. You could get your hand up.

Q. What is the width here (pointing). About 18 inches? A. On the top part, two feet.

Q. Did you measure it?

A. I have not measured it, no. I have measured it in my time; I don't know now.

Q. You don't recollect?

A. I don't recollect. It would be either 22 or 24 inches, I should say, the diameter of it.

Q. That is simply your memory and a guess at it?

A. Yes, sir.

Q. You say about four inches between the collar?

Mr. CAMPBELL.—He said between 3 and 4 inches.

Mr. DENMAN.—He said about 4 inches.

Mr. CAMPBELL.—He said between 3 and 4.

A. I said between 3 and 4, and you said 4 inches. I said yes, you are just able to put your hand up there. It is between 3 and 4.

Further Redirect Examination.

Mr. CAMPBELL.—Q. I want to ask you a few more questions to clear the record which has been

(Deposition of Lambert Page.)

produced of how the cargo plan was made. I should like to ask you, Mr. Page, from when and what you made up this stowage plan that is shown in this book.

[163]

A. From the rough—

Q. When did you make it up first?

A. In Antwerp. I started to make it up in Antwerp.

Q. Day by day? A. Day by day, yes.

Q. When did you work on it?

A. Of an evening after all the work is finished of the day.

Q. From what would you make it up?

A. From a rough plan that I carried about with me, and also a note-book.

Q. When would you make notations on the rough plan?

A. During the whole day as things were going into the ship, and as they came down to the shed.

Q. When would you make your notes?

A. At the same time.

Q. Is it a true and correct plan of the stowage of the ship?

A. Yes, sir, it is a true and correct plan of the stowage.

Q. Is the stowage plan at all made up from the entries which are shown on the various pages alphabetically arranged. A. No, sir.

Mr. DENMAN.—I call for the notebook and the original plan from which this is made up.

Mr. CAMPBELL.—Q. Have you the notes and

(Deposition of Lambert Page.)

the original plan on board of the ship?

A. I could not say whether I have or not.

Q. If you have, mail it to me, and we will deliver it to Mr. Denman so that he can test the veracity of it with the present plan.

Mr. DENMAN.—Or the accuracy of it.

Further Recross-examination.

Mr. DENMAN.—Q. You do not mean to say you can carry in your head all the details of the loading of a great ship like that?

Mr. CAMPBELL.—He has not testified to that.

Mr. DENMAN.—Q. You do not mean to say you can carry in your head the loading of a great ship of that kind? A. No, sir.

Q. You depended on your notes when you made that thing up, didn't you?

A. I depended on my notes. On the general outline I have, [164] a very good idea as the thing goes along. I can remember quite a number of things up and down the holds and in the shed, watching things coming down and puttering about the whole day; not only myself, but the second and third officer is watching the cargo in each hold.

Q. This was made up in part then from the information that you got from the second and third officers? A. No, sir.

Q. It was not?

A. No, sir. I might ask them a question now and then.

Q. As to where the cargo was stowed, you mean?

A. If they were putting down something in No. 4

(Deposition of Lambert Page.)

hold and I wanted to get down No. 1 to see anything, I would probably sing out to the officer, "Where are they putting down that stuff. Are they putting it on the fore part?" or any other part of the hold that they were putting it in, so that I should know; and when I came up from No. 1 I would go down No. 4 and look at it.

Q. As you discharge the vessel from the various hatches do you get receipts for the cargo that you deliver? A. No, sir.

Q. You do not? A. No, sir.

Q. How can you check up what you have in the different hatches? How do you do that? You have a lot of cargo for San Pedro in a certain hatch.

A. Yes, sir.

Q. How do you check that out when you deliver it, make a list as it comes out?

A. All the officers did was to watch the hold to see there was nothing pilfered.

Q. Who makes that list as it comes out, the freight clerk? A. Yes, sir.

Q. Suppose I want to find out what hold that enamel ware came out of, from whom will I find that?

A. You will be able to find out from the clerks who are tallying the cargo out. [165]

Q. Do you recollect that tally?

A. We have not done it this time; we watched that there was no pilfering going on.

Q. The ship has no check on the tally of the clerks?

A. No, sir.

Q. That is correct, is it? A. Yes, sir.

United States of America,
State and Northern District of California,
City and County of San Francisco.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the witnesses Lambert Page and J. Nelson Craven is material and necessary in the cause in the caption of the said depositions named, and that they are bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Tuesday, May 2d, 1911, at 4:30 P. M., I was attended by William Denman, Esq., Proctor for the libelants, and by Ira A. Campbell, Esq., proctor for the respondent, and by the witnesses who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Clement Bennett, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same were taken.

Accompanying said depositions and annexed thereto and forming [166] a part thereof are Respondent's *Exhibit* "A," "B," "C," "D," "E," and "F," and Libelants' Exhibit 1.

And I further certify that I am not of counsel nor attorney for any of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the city and county of San Francisco, State of California, this 13th day of May, 1911.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed May 13, 1911. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [167]

*In the District Court of the United States in and
for the Northern District of California, First
Division.*

(No. 15,156.)

THE AMERICAN IMPORT COMPANY, a Corpo-
ration, et al.,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, etc.,

Claimant.

**Depositions of S. N. Keame and Norman Watkins
Taken on Behalf of Claimant.**

BE IT REMEMBERED that on Tuesday, February 4th, 1913, pursuant to stipulation of counsel hereunto annexed, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., S. N. Keame and Norman Watkins, witnesses produced on behalf of the claimant.

William Denman, Esq., of the firm of Denman & Arnold, appeared as proctor for the libelants, and Ira A. Campbell, Esq., of the firm of Messrs. McCutchen, Olney & Willard, appeared as proctor for the claimant, and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties, that the depositions of S. N. Keame and Norman Watkins may be taken *de bene esse* on behalf of the claimant at the offices of Messrs. McCutchen, [168] Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Tuesday, February 4th, 1913, before Francis

(Deposition of S. N. Keame.)

Krull, a United States Commissioner for the Northern District of California, and in shorthand by Herbert Bennett.

It is further stipulated that the depositions, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.

[Deposition of S. N. Keame, for Claimant.]

S. N. KEAME, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. S. N. Keame.

Q. How old are you? A. 47.

Q. Are you a ship master? A. Yes, sir.

Q. Of what ship are you now master?

A. Steamer "Turion."

Q. How long have you been following the sea?

A. Since I was 16 years of age; 31 years.

Q. How long have you been master of steam vessels? A. Six and a half years.

Q. How long were you first officer carrying steamers prior to that?

(Deposition of S. N. Keame.)

A. Five years in steam and about three and a half in sail.

Q. In what trades have you been master of steam vessels? A. Brazilian trade and Cape trade.

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Q. Cape of Good Hope?

A. Yes, sir, and to the East Indies, New Orleans, Galveston, West Indies, Portland and around here, San Francisco.

Q. In the East Indies do you include Calcutta?

A. I have been a master in Calcutta, Rein Guen and also Carache.

Q. As first officer in what trade were you?

A. Much the same and also a good deal in Calcutta.

Q. What is the size of the "Turion"?

A. Her registered tonnage is 3854.

Q. Net tonnage? A. That is net, yes, sir.

Q. What is the size of her No. 1 between-deck hold?

A. Her No. 1 between-deck—it is 60 feet by 44 at the aft end.

Q. 60 feet long? A. Yes, sir, and 8 feet high.

Q. What is her beam?

A. 44 at the biggest end; of course, this hatch closes some.

What is it at the forward end?

A. I should have to guess that. 30 feet I should say would be a very fair approximation.

Q. Is that ventilated by means of ventilators?

A. Yes, sir.

(Deposition of S. N. Keame.)

Q. How is your No. 1 between-deck hold ventilated? A. By four ventilators.

Q. Where are they located?

A. Two on the forward end of the hatch and two on the aft end of the hatch.

Q. Do those ventilators extend as a solid pipe from the main deck or the upper deck through to the lower hold? A. No, sir, there is a pipe inside.

Q. What is the size of the ventilator pipe which extends from the main or upper deck to the between-deck holds?

A. That is the inside pipe, you mean?

Q. The outside pipe. The first pipe that extends from the outside?

A. Seventeen inches; $16\frac{3}{4}$ inches to be exact.

Q. Just make me a drawing, if you will, of that; of the cross [170] section foot of the pipe leading from the upper deck to the between-deck hold?

A. That is not clear.

Mr. DENMAN.—Q. Draw it yourself?

A. Yes, sir.

Mr. CAMPBELL.—Q. Has it a hood on it that turns back?

A. Yes, sir; that is the upper part exactly. I understand now.

Q. Now, what is the diameter of the pipe that extends down into the between-deck hold?

A. This is 16 and three-fourths, this is one here (pointing).

Q. Is there a pipe inside? A. A pipe inside.

(Deposition of S. N. Keame.)

Q. That runs to the lower hold? A. Yes, sir.

Q. Is it as I draw it here?

A. Yes, sir, that is it.

Q. What is the space between the outside pipe and the inside pipe? A. 2 and one-fourth inches.

Q. That is the space that I mark now?

A. Yes, sir, that is the space exactly.

Q. That is to say, what is the diameter of the inside pipe which extends from the between-deck to the lower hold? A. That is 12 and one-half inches.

Q. What has been your experience with that ventilation as to its sufficiency?

A. I have found it very efficient.

Q. Do you assist in ventilating the holds of your vessel by means of the hatches? A. Yes, sir.

Q. Now, captain, assume that the steamer "Skip-ton Castle" had a between-deck hold 60 feet long by 39 feet wide at the aft end and 30 feet wide at the forward end and a height of 8 feet and had four ventilators; two in the forward end of the hold and two aft of the hatch of the size of ventilators which you have, I will ask you whether or not in your judgment those ventilators were of sufficient size to give that hold proper ventilation?

Mr. DENMAN.—I object to the question on the ground that it is not shown the character of cargo ventilated; the class of cargo. [171]

Mr. CAMPBELL.—Q. Of general cargo, including mineral water, baskets and wool? A. Yes, sir.

Q. How does that system of ventilation, those size

(Deposition of S. N. Keame.)

of ventilators compare with the general system of ventilators in use in cargo carrying vessels?

A. I don't quite understand the question.

Q. With cargo carrying vessels of the size of your vessel how does your system of ventilation with respect to your ventilators and size compare in general use with the English cargo carrying steamers?

A. Very favorable.

Q. Are they larger or smaller?

A. They are larger?

Q. I say how do the size of those generally in use compare with the size and type of your vessel?

A. I should say very favorable.

Q. What do you mean by "favorable"?

A. In regard to size?

Mr. DENMAN.—Q. Are they larger or smaller?

A. They are much the same, as far as I know.

Mr. CAMPBELL.—Q. How many vessels have you been in? A. In our own concern?

Q. Yes.

A. Over a dozen; say 14 or 15, I should think.

Q. How do they compare with the type of the "Turion"?

A. Much the same. They run practically the same.

Q. Which hold of a cargo carrying steamer would you regard as the coolest? A. No. 1.

Q. Which hold would you regard as being coolest and freest from ventilation?

A. No. 1, particularly the between-decks.

Q. If you were to carry cargo which might be

(Deposition of S. N. Keame.)

affected by heat in which part of the vessel in your judgment would it be proper and best to place it?

A. No. 1, most decidedly.

Q. No. 1 lower hold, or No. 1 between-deck?

A. No. 1 between-deck if I could preferably.

Cross-examination.

Mr. DENMAN.—Q. Take mineral waters that are affected by heat, would you stow them in No. 1 hold?

A. No. 1 between-deck. [172]

Q. If you could? A. Yes, sir.

Q. What is the reason for that?

A. Well, it is farthest away from the boilers for one thing and experience has taught us it is the best place to put them.

Q. Mineral waters are liable to blow up if they get too hot? A. They are.

Q. Have you ever had that experience?

A. No, sir.

Q. The chief thing is to get them in the coolest place? A. Yes, sir.

Q. Because they are liable to burst from the heat?

A. Yes, sir.

Q. What experience have you had with the maintenance of temperatures in the holds of your ship; you have had no little experience in taking temperatures?

A. Yes, sir.

Q. Will the *hold* vary greatly in the temperature of a vessel? A. Yes, sir.

Q. How greatly will they vary?

A. Well, up to 10 and 15 degrees sometimes.

(Deposition of S. N. Keame.)

Q. Those holds which are nearest the engines are warmer than those further away?

A. We generally find that the case. For instance, vessels with big holds hold more stuff in them and naturally they are closer packed; No. 2 particularly and the same on the hatch abaft the engines *where* we generally look upon as the worst for sweating.

Q. In taking the temperatures of holds have you ever found your No. 1 hold the hottest in the ship in any case you can recall? A. I cannot recall that.

Q. You would remember that if you had, as it is regarded as the coolest hold?

A. Yes, sir, it is the coolest. I have no recollection of finding No. 1 the hottest.

Q. What is the method of taking temperatures in hold; how do you find out whether a hold is cool or hot? [173]

A. We take the temperature by putting thermometers down in the ventilators and generally keep them down and take them twice a day.

Q. And you average that? A. Pretty well, yes.

Q. How much will *you* holds vary from the temperature of the outside air?

A. In extreme cases up to 20 degrees, I should say, or getting on that way, 15 to 20 degrees say in very hot weather.

Q. It would be rather an extraordinary condition where you found 50 degrees difference between the hold and the outside?

A. Yes, sir, I should be looking for trouble then,

(Deposition of S. N. Keame.)

that is a case of 50 degrees difference.

Q. Why do you have this pipe—as I understand it this pipe leading from the lower hold up to the upper deck through the between-deck is solid so that none of the air from that pipe could get in the between-deck space? A. Yes, sir.

Q. Is that to prevent any foul matter getting between the between-deck? A. Yes, sir.

Q. As I understand it, the air coming from the lower hold goes right up through there and would not stop at the between-deck? A. It would drift up.

Q. Suppose you had great heat down there you could not expect that heat to drift back through, it would naturally go out?

A. Our experience shows it does go out, we never look for that.

Q. That is the reason why it is made solid?

A. Yes, sir.

Q. That is to say, made solid from the lower hold to the outside deck? A. Yes, sir.

Q. Everything passes between the between-deck hold to the outside space? A. It does not do that.

Q. You want it to do that? A. No, sir.

Q. Your idea is to prevent the heating or moisture from getting into the between-decks? A. Yes, sir.

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Q. That is true of your aft ventilators?

A. Yes, sir.

Q. Now, supposing you were to pack your cargo tight up against the ventilators in the lower hold,

(Deposition of S. N. Keame.)

either pack it right up against the ventilators, or right up against the beams?

A. Against the opening?

Q. Right at the opening, as I understand it, your beams extend? A. Some distance down.

Q. They extend from side to side on a vessel like that? A. Yes, sir.

Q. And the opening is up at the top of the beams?

A. Yes, sir.

Q. Assume that you load your cargo up tight against the beams so that the air could only get from side to side and could not get forward or aft your beams? A. Yes, sir.

Q. What would happen to the air coming in at the top of your ventilators, it would all be forced out in the between-deck space, would it not?

A. This is the lower hold that you are speaking about?

Q. Assume that the cargo is loaded tight up to the top of the ventilators in the lower hold—

A. Yes, sir.

Q. And you have turned your ventilators to get the wind. A. Yes, sir.

Q. Now, supposing you have done that. This cargo is tight up against the lower hold. Would that not force all your air out in the between-deck space? A. I don't see why it could not be so.

Q. It would come in between the sleeves?

A. We always trim the ventilators back to the wind.

Q. You mean both forward and aft?

(Deposition of S. N. Keame.)

A. Yes, sir, both forward and aft. We use our ventilators not to force the wind down, but as an uptake.

Q. As an uptake how does it get in to supply the vacuum created by the uptake, what you take out you have to get in; how does it get in?

A. I suppose it does get in at the same time. It is the heat we look after. All the ventilators on board ship are looked [175] upon as an uptake rather than a downtake.

Q. For the purpose of taking any heat?

A. Yes, sir.

Q. What would be the objection to turning one of your ventilators towards the wind and the other one away. Why don't you do that? A. We tried that.

Q. What did you give it up for?

A. Our experience showed us the best plan.

Q. Do you get too much moisture in the other way?

A. No, sir.

Q. Why is it better?

A. The only answer I can give is we considered it the best plan to turn them from the wind; our experience has shown that.

Q. What does your experience show you?

A. We keep the holds cooler by leaving all ventilators back to the wind than if we turned one ventilator to the wind and the other away.

Q. Has that been known a great many years by ship men? A. It is accepted by us.

Q. It has been known for a great many years?

A. Yes, sir; of course, there is a difference of opin-

(Deposition of S. N. Keane.)

ion about it. Some men believe in trimming two of the ventilators—say there are six; some of them believe in trimming the two aft ventilators to the wind and the forward ones away from it.

Q. Is it not true that one of the objections to that is that if you have a very warm day and your ventilators are faced towards the wind a great deal of moisture is down in the hold?

A. That might be true.

Q. If you have them faced away it would be an outdraw without so much going in?

A. Yes, sir, as I said, our principle for it is our past experience.

Q. Are there any cargoes you carry that you shut up tight forward and don't use ventilators?

A. Cotton. [176]

Q. You don't use the ventilators at all?

A. We cover the ventilators up.

Q. You do not take the ventilators off?

A. No, sir, we never interfere with them except to cover them over.

Q. It does not need ventilation to keep it dry?

A. No, as long as the cotton comes in dry.

Q. Did you ever carry bone-meal?

A. I have no recollection.

Q. Did you ever carry any fertilizer of any kind?

A. I have no recollection of carrying any.

Redirect Examination.

Mr. CAMPBELL.—Q. In storing sack cargo against the beams as Mr. Denman has described to you has it been your experience that that shuts off

(Deposition of S. N. Keame.)

ventilation or will the cargo still be ventilated?

A. If it is that high up it shakes down quite a considerable bit; it always settles.

Q. When you say that we consider it best to keep the ventilators turned from the wind to whom do you refer by we? A. Principally our own ships.

Q. The Harrison Line?

A. The big fleet. Of course, we have a great deal of experience in this Calcutta trade, which I think is the greatest sweating cargoes that you can carry.

Recross-examination.

Mr. DENMAN.—Q. You say you have never carried bone-meal, or fertilizer?

A. I have no recollection.

Q. You don't know how it packs, or settles, or anything of that kind of your own knowledge?

A. No, sir.

Mr. CAMPBELL.—I will offer the drawing in evidence and ask that it be marked Claimant's Exhibit 1.

(The drawing is marked "Claimant's Exhibit 1.")

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[Deposition of Norman Watkins, for Claimant.]

NORMAN WATKINS, called for the Claimant, sworn.

Mr. CAMPBELL.—Q. Where is your home, Mr. Watkins? A. Honolulu.

Q. Are you leaving for Honolulu this afternoon?

A. Yes, sir, at five o'clock to-day.

Q. What is your business?

A. Fertilizing manufacture business. I am gen-

(Deposition of Norman Watkins.)

eral superintendent of the Honolulu Fertilizing Company.

Q. Where do they do business?

A. Honolulu and San Francisco. At the present time I am acting manager of the Honolulu end of the business.

Q. How long have you been engaged in that business? A. Nearly 15 years.

Q. At what place? A. Honolulu.

Q. Have you ever been connected with any stevedoring concern in Honolulu?

A. Yes, sir, I have been connected with McNab, Hamilton & Kearny Company, Limited, for the past 12 or 13 years.

Q. Now, have you ever handled a fertilizer called bone-meal? A. Yes, sir.

Q. How many years have you handled it?

A. Ever since I have been in the business, nearly 15 years.

Q. How many tons do you suppose you have handled?

A. I would say roughly in round figures 10,000 tons.

Q. Have you ever seen bone-meal discharged from ships carrying it into Honolulu Harbor?

A. Very frequently.

Q. Have you ever had any experience with bone-meal heating? A. Never.

Q. Have you ever seen a ship loaded, or any quantity coming out of a ship discharged in Honolulu Harbor in a heated condition? A. No, sir, never.

(Deposition of Norman Watkins.)

Q. Do you know whether or not the Pacific Mail ever carried any bone-meal to Honolulu?

A. Very frequently. [178]

Cross-examination.

Mr. DENMAN.—Q. What is the element in bone-meal that makes it valuable as a fertilizer.

A. Phosphoric acid and nitrogen.

Q. How about the ammonia?

A. We speak of ammonia and nitrogen in the same terms, as one and the same thing.

Q. What percentage of ammonia or nitrogen will the bone-meal give out?

A. Five per cent ammonia.

Q. How is that eliminated; how do you get it out?

A. How is it gotten out?

Q. Yes.

A. Why, in the process of manufacture of bone-meal some manufacturers extract it.

Q. I mean how it is gotten out for the purpose of fertilization?

A. It is not gotten out, it is put in and ground as bone-meal.

Q. How is the ammonia gotten out in the grinding process? A. By decomposition.

Q. It is animal fertilizer? A. Yes, sir.

Q. This decomposition gives off the ammonia and that gives nitrogen to the roots?

A. Ammonia and nitrogen may be termed as the same thing.

Q. The process is decomposition in the ground un-

(Deposition of Norman Watkins.)

der the influence of heat and moisture?

A. Yes, sir, exactly.

Q. That nitrogen is eliminated and it reaches the roots that you desire to fertilize?

A. Yes, sir, exactly.

Q. Now, when you say that you never knew of bone-meal heating have you ever been engaged in the manufacture of bone-meal?

A. Not to any great extent. We grind about 100 tons of bone-meal a year in Honolulu.

Q. Have you ever piled it in great piles of three or four thousand boxes just after manufacture?

A. Not to the extent of three or four thousand boxes. We frequently pile it freshly ground from [179] 800 to 1000 boxes. We generally grind bone-meal twice a year; about 50 tons every six months.

Q. Have you ever taken the interior temperature of those piles? A. Never.

Q. Where did you pile that, out of doors or indoors? A. Indoors.

Q. In Honolulu? A. In Honolulu.

Q. Is it exposed to the air, or is it enclosed in houses?

A. Exposed to the air more or less. All our warehouses are closed at night.

Q. You have not got any with open sides such as those like sheds? A. No, sir.

Q. You say you have never taken any temperature of the holds of a ship with bone-meal on board of them? A. No, sir.

Q. All you can testify is when the bone-meal has

(Deposition of Norman Watkins.)

been taken off at Honolulu it has not been warm at that time. That is the limit of your experience?

A. In my experience I have never seen any heated bone-meal.

Q. Your experience is confined in taking it off at the end of the voyage in Honolulu, is it not. You have never travelled with any? A. No, sir.

Q. All you can say is you have never seen any heated bone-meal come off of the ship at Honolulu. That is the limit of your experience?

A. That is exactly so.

Q. Did you ever have your bone-meal piled up long enough so that the ammonia affected the sacking in which it was contained?

A. There have been occasions when by means of a leaking roof that I can recall where we have had bone-meal wet, that is slightly wet and under those conditions I have noted that the sacks rotted very quickly.

Q. That must be by the moisture and heating combined to eliminate the ammonia and destroy the sacks?

A. It is decomposition; the same as a wet sack in time will rot. I presume the decomposition [180] of the bone ate that.

Q. Heat always causes decomposition?

A. To a certain extent, undoubtedly.

Q. That is, you can take manure and hatch eggs under those conditions?

A. That is a common practice with the Chinese in Manila to hatch ducks for them every day.

(Deposition of Norman Watkins.)

Q. Is not the chief value of the stable manure the ammonia you get from it?

A. That is the chief value, yes.

Redirect Examination.

Mr. CAMPBELL.—Q. Have you ever seen bone-meal delivered in ship's hold which gave evidence of having heated on the voyage? A. I have not.

Q. Have you had any quantity of bone-meal stowed in your warehouse at Honolulu?

A. We frequently have up to 500 tons on hand at one time.

Recross-examination.

Mr. DENMAN.—Q. Have you ever had it come out of ships where the sacks had rotted and you had to resack a large portion? A. No, sir.

Q. That would indicate there had been fermentation? A. I should say so.

Q. You always had it come there without such accident?

A. I never had any experience with damaged packages of bone-meal.

Mr. CAMPBELL.—Q. Have you imported it both from Europe and from the Orient? A. Yes, sir.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the witnesses [181] S. N. Keame and Norman Watkins,

is material and necessary in the cause in the caption of the said depositions named, and that they are bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further, certify that on Tuesday, February 4th, 1913, I was attended by William Denman, Esq., of the firm of Denman & Arnold, proctor for the libellants, and by Ira A. Campbell, Esq., of the firm of Messrs. McCutchen, Olney & Willard, proctor for the claimant and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennet, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, First Division, the Court for which the same were taken.

Accompanying said depositions and annexed thereto and forming a part thereof is "Claimant's Exhibit 1."

And I further certify that I am not of counsel nor attorney for any of the parties in said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the city and county of San Francisco, State of California, this 3 day of Mch. 1913.

[Seal] FRANCIS KRULL,
U. S. Commissioner for the Northern District of
California, at San Francisco.

[Endorsed]: Filed Mch. 3, 1913. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [182]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

THE AMERICAN IMPORT COMPANY, a Cor-
poration et al.,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, etc.,

Respondent.

**(Deposition of William Baird, Taken on Behalf of
Respondent.)**

BE IT REMEMBERED that on Wednesday, April 15th, 1914, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., William Baird, a

witness produced on behalf of the respondent.

William Denman, Esq., appeared as proctor for the libelants, and Ira A. Campbell, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties, that the deposition of William Baird may be taken *de bene esse* on behalf of the respondent, at the office of Messrs. McCutchen, Olney & Willard, in the city and county of San Francisco, State of California, on Wednesday, April 15th, 1914, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand [183] by Herbert Bennett.

(It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.)

[Deposition of William Baird, for Respondent.]

WILLIAM BAIRD, called for the Respondent, sworn.

By Mr. CAMPBELL.—Q. What is your name, Captain? A. William Baird.

Q. How old are you? A. 38.

Q. How long have you been going to sea?

A. Since I was 16; that is 22 years.

Q. How long have you held master's papers?

A. Since I was 24; that is 14 years.

Q. What class of papers do you hold?

A. An ordinary master's certificate.

Q. British?

A. Oh, yes, do you want the number of it?

Q. No. Are you master of any vessel now?

A. Of the "Crown of Toledo."

Q. When is she to leave here? A. To-night.

Q. Where is she bound for?

A. London, via Pisagreo, Chili.

Q. Before you became master, were you ever an officer, chief officer?

A. Yes, sir, I was chief officer in that company for 10 years.

Q. How long have you been master for this company? [184]

A. The first time I was master was about 8 years ago, that is the beginning of it.

Q. What company owns your ship?

A. The Crown Steamship Company, of Glasgow.

Q. How many ships do they operate?

A. 9, but they are amalgamated with other com-

(Deposition of William Baird.)

panies, you know.

Q. What is the size of your vessel?

A. She carries 10,000 tons.

Q. What is her length? A. 475 feet.

Q. And her beam?

A. The beam of the ship is 58 feet.

Q. What trades have you sailed in, as an officer of vessels, both as master and chief officer?

A. With this company we sailed in the West Indies trade, from Glasgow to the West Indies, carrying general cargo from Glasgow to the West Indies, and sugar and cocoa and general cargo home again.

Q. How long were you engaged in that trade?

A. About 9 years.

Q. Can you tell me the size of your deck, No. 1, between-deck hold? A. Yes, sir.

Q. The size of that hold in the "Crown of Toledo"?

A. Yes, sir.

Q. What is it?

A. The length of that hold is 78 feet, and the breadth of it at the forward end is 36 feet, and at the aft end is 49 feet.

Q. The height?

A. The height is 9 foot 2 inches.

Q. Have you any ventilators in it?

A. 4 ventilators, 2 at each end.

Q. What is the diameter of the ventilator leading from the upper deck into the between-deck hold?

A. There are 2 that go through; I have 2 decks, the shelter deck and the between-deck.

Q. What is the first deck?

(Deposition of William Baird.)

A. A 2-foot ventilator and an inside pipe again 16 inches.

Q. Where does the inside pipe lead to?

A. Into the between-decks.

Q. What do you call the cargo compartment immediately beneath the [185] shelter deck?

A. Between-decks, and then my lower hold beneath the between-decks.

Q. What is the first hold?

A. Shelter deck space.

Q. Are those ventilators all of the same size?

A. There is a tube into each of them, decreasing in diameter as they go down.

Q. The tube leading from the upper deck, or shelter deck, into the lower deck space—

A. (Intg.) 16 inches in diameter.

Q. Let me finish my question. The tube leading from your upper deck into the shelter deck space is two feet in diameter? A. Yes, sir.

Q. What is the diameter of the tube leading from your shelter deck space into your between-decks?

A. 16 inches.

Q. And what is the diameter of the tube leading from your between-decks into your lower hold?

A. 10 inches.

Q. Have you ever, in your experience, carried any bone-meal? A. Yes, sir.

Q. Where?

A. I carried it from Glasgow and London to the West Indies, to Mantresh, for fertilizing purposes; to various places in the West Indies islands.

(Deposition of William Baird.)

Q. In what quantities have you carried it?

A. About 300-ton blocks.

Q. How often did you carry it in that trade?

A. Well, I carried it at least 3 times in a year, very often; but the blocks sometimes were larger and sometimes smaller in that trade; the state would order a larger quantity of fertilizer and bone-meal; they would order about 2000-ton shipment, not of bone-meal, alone, but of all kinds of fertilizer.

Q. Over what space of time on that run have you carried bone-meal to the West Indies islands?

A. During all the time that I have been in the company, on and off at various times. [186]

Q. In all that time, have you ever known bone-meal to heat?

A. Never heard about it; never dreamt about it.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. DENMAN.—Q. Do you know what bone-meal is?

A. Yes, sir, it is a fertilizer, it is the stuff ground down, old bones for fertilizing purposes; it comes from the slaughter-houses, as a rule, doesn't it?

Q. That is an animal fertilizer?

A. Yes, sir, an animal fertilizer.

Q. Did you ever stow any of it on board when it had been wet, to your knowledge?

A. Not to my knowledge, no; we do not usually stow any cargo when it is wet like that; we might take it out when it is wet, but never stow it when it is wet.

(Deposition of William Baird.)

Q. Have you any recollection of taking any bone-meal out when it was wet?

A. No, sir, I have no recollection.

Q. Do you know, or do you not know whether bone-meal will heat when it is wet. You know the chemical properties of getting the fertilizer out of it?

A. No, sir, I know nothing about it.

Q. What is the purpose, Captain, of these separate tubes that run down?

A. For ventilation purposes, so as to allow the other holds to get ventilation.

Q. Suppose you have this situation: Suppose you have a lower hold that is warmed by your furnaces, and interior heat of your ship, and you have, in your shelter deck, as something you want to keep cool, do these tubes have the effect of taking the warm air from the lower hold clean through to the outside, so that it will not mix with the other air?

A. Yes, sir, the interior of the ship does not get heated at all by any furnaces, everything like that is away from the lower space. It would only be the sort of sweat from cargo in the lower hold, that all goes away clear. [187]

Q. It is your idea with regard to that to get that clear through to the upper deck, without having it go into the interior hold? A. Yes, sir.

Q. That is the purpose of these separate tubes, so the sweat will go right out from the lower hold and not permeate the other hold?

A. Yes, sir, if these tubes were not there, it is quite possible the stevedores might put a big case of

(Deposition of William Baird.)

cargo over the hole altogether, and have no ventilation of any description.

Q. Your idea, then, is to have a different ventilator for each hold? A. Yes, sir.

Q. To keep the ventilation from one hold going to the other?

A. Yes, sir, approximately so, it goes right straight up. The idea of tubes, so far as we know, is to make sure the ventilation gets into the hold.

Q. And gets out also?

A. Yes, sir, and gets out. Hot air will arise.

Q. Have you ever carried Apollinaris?

A. Yes, sir, it is mineral water.

Q. Yes, charged mineral water.

A. In bottles?

Q. Yes, in bottles. A. Yes, sir.

Q. Would you stow that in with fertilizer? Would you call that proper stowage to mix it with fertilizer?

A. I would not mix it with fertilizer; I could not see that it would do any harm; if I had a block of fertilizer here and a block of mineral water in some hatch, provided there was no smell from the fertilizer, I could not for the life of me see it would hurt, just as long as it did not smell; I would not like to send cargo ashore smelling.

Q. You do not think it would do any damage?

A. None whatever.

Q. Have you ever had any advice as to the character of different kinds of bone-meal, or have you

(Deposition of William Baird.)

only carried one kind?

A. I might have carried half a dozen different kinds, but as far [188] as I knew, they were all bone-meal to me.

Q. What is your practice with regard to the stowage of Apollinaris? Where do you carry it on your ship, or mineral waters of that character?

A. It altogether depends on how much the shipment is. Supposing it was a few cases of mineral water, it would be stowed anywhere.

Q. Suppose you had a large shipment?

A. If we had a large shipment, then we would stow it as far as possible to be handy for the port it was going to; these general cargo steamers nowadays, you have got to consider that; in an ordinary steamer nowadays, mineral water is put anywhere. I would not stow it right up against the boilers, if I had boilers; these ships are all insulated against that nowadays. There is no heat in your hold.

Q. Won't your temperature run up as high as 90 degrees in the hold at times?

A. I never found it there, I would not like to think it was; I would be looking for a fire, and I would be getting to feel very worried if I found it rising at all.

Q. Suppose you found it rising up as high as 90 degrees?

A. I would look to see if there was any fire; I don't expect anything like that down in the hold.

Q. Would you regard such hold as being seaworthy with regard to carrying mineral water?

(Deposition of William Baird.)

A. I do not know what effect it would have. I never found a hold with a temperature of 90 degrees. I never take a thermometer down there to see, but I would know if the temperature was 90 degrees down there.

Q. You do not take the temperature of the hold?

A. Occasionally, we only take the temperature if we carry coal in a ship.

Q. You never take any temperature of these bone-meal cargoes? A. No, sir.

Q. Bone-meal and this stuff?

A. No, sir. I have been superintending [189] as chief officer when cargoes were being discharged and the men handling the bags, if they found a bag was warm we would inquire about it.

Q. You would not know whether it was warm and had been cooled off?

A. No, sir, we would not know that.

Q. How is that on a West Indies voyage, do you have a great deal of sweat? A. Yes, sir.

Q. You do?

A. Our ships are protected against sweat, so far as possible; the sugar cargo sweats.

Q. How do you handle your sugar cargo? Do you put it in a forced draft ventilation?

A. The ordinary ventilators; the only time it sweated, as we speak about sweat, is going from hot into cold, around the hatch coamings we find sweat, that is because going from the tropical heat and approaching the cold in England in the winter time, you require all the ventilation you can get, or other-

(Deposition of William Baird.)

wise your upper decks and coamings would be wet. We do not consider that from heating, that is ordinary vapor coming up from temperature, the hot air in the hold; the hot air from the tropics bottled up in the hold.

Q. In your general cargo you have that same trouble from sweat? A. Just the same.

Mr. DENMAN.—That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. How old is your vessel?

A. This vessel?

Q. Yes. A. 2 years.

Q. How does she compare with the modern cargo-carrying vessels of British construction?

A. She is supposed to be the last thing, two years ago.

Q. What is your judgment as to whether or not your shelter deck space in No. 1 hold is or is not a suitable place to carry any [190] cargo which would require the maintenance of even temperature and cool temperature?

A. It is impossible to put it anywhere that would be so suitable as No. 1 hold, or No. 1 between-deck; but still I contend that there should be no difference anywhere in the ship; unless you have some old ship that had a boiler stuck in the hold, one of the holds.

Mr. CAMPBELL.—That is all.

Recross-examination.

Mr. DENMAN.—Q. You say if you reached a temperature of 90 degrees in your hold you would be

(Deposition of William Baird.)

worried, you would be looking for fire?

A. Yes, sir.

Q. If you got up to 100, you would be still more worried? A. Yes, sir.

Q. And if you got up to 110, you would be some worried, indeed?

A. I would not want to find it.

Q. You think at 90 degrees there would be a fire, you would still think more so at 100?

A. I would not expect to find any hold much different in the temperature than the outside air was.

Q. The reason that you put your mineral waters carbonated up in the between-deck space is because of the fact it is as cool a stowage as you could find, is it not?

A. That would be one reason, and if it was a large block, you would have to consider where you could put them the handiest; if there was a large block of mineral water, you could cut off the space in No. 1 and put them there. Really, that would be the best place on a long voyage; a ship traveling from the tropics to Europe, she has got to go through the tropics twice, coming down and going up, and No. 1 would be the most suitable place for that kind of cargo. Of course, we know mineral water will break themselves, without any assistance from anybody else.

Q. You have seen a bottle pop out in the sun?

A. Yes, sir.

Mr. DENMAN.—That is all. [191]

United States of America,
State and Northern District of California,
City and County of San Francisco.—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness, William Baird is material and necessary in the cause in the caption of the said deposition named, and that he is about to go away, and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Wednesday, April 15th, 1914, at 4:00 P. M. I was attended by William Denman, Esq., proctor for the libelants, and by Ira A. Campbell, Esq., proctor for the respondent, and by the witness who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption. [192]

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the city and county of San Francisco, State of California, this —— day of April, 1914.

FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed April 16, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [193]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corpo-
ration, et al.,

Libelants,

vs.

The British Steamer “SKIPTON CASTLE,” etc.,
Respondent.

(Opinion and Order Fixing Liability on the "Skipton Castle," etc.)

WILLIAM DENMAN, Esq., Proctor for Libel-
ant.

IRA A. CAMPBELL, Esq., and McCUTCHEN,
OLNEY & WILLARD, Proctors for Claim-
ant.

In December, 1910, libelants shipped on board the British steamer "Skipton Castle," then lying in the port of Antwerp, Belgium, certain merchandise to be carried from said port to San Francisco. This merchandise, consisting for the most part of mineral water, baskets and enamel ware, was stowed in the No. 1 between-decks. In the No. 1 hold immediately below was stowed a quantity of bone-meal. The hatch between the No. 1 hold and No. 1 between-decks was not entirely closed, but was left with spaces between the *board* so that the air from the hold could rise freely into the between-decks. The merchandise, when delivered in San Francisco, was badly damaged, the damage, speaking generally, consisting of the bursting of the bottles containing the mineral water; the molding and rotting of the baskets, and rusting of the enamel ware.

The bills of lading provide, among other things, that the ship "should not be liable for loss or damage occasioned by the act of God * * * sweating * * * decay, or the indirect causes thereof, [194] contact with, or smell or evaporation from, other goods * * * injury to wrappers, however caused * * * heat * * * at any time or in

any place * * * or any other perils of the sea; the negligence, default or error in judgment of the master, pilot, mariners, engineers, stevedores or other persons employed in or about the ship."

It is claimed that whatever injury was suffered was the result of some one of the enumerated exemptions.

The loading of the vessel at Antwerp was concluded on December 18th, and that day she left Antwerp and proceeded to Hull, where she arrived on the morning of December 19th. On the morning of December 21st she left Hull for her destination on this coast via Las Palmas. The loading of libelants' merchandise was completed on December 17th, so that on December 22d, when the temperature of the holds was first taken, as disclosed by the log, this merchandise, allowing for the time required to load and stow it, was on board something over five days. On December 22d, the mean temperature of the No. 1 hold, was ascertained to be 101, while the temperature of the air ranged during the day from 52 to 53 and the mean temperature of the other holds was as follows:

No. 2, 83; No. 3, 82; No. 4, 83; No. 5, 87; poop, 84. On December 23d the mean temperature of No. 1 hold was 100, the temperature of the air ranging during the day from 53 to 57, and that of the other holds ranging from 80 to 86. So through succeeding days the temperature of No. 1 hold was much higher than that of any of the others, and from 30 to 50 degrees higher than that of the air. On December 29th

the "Skipton Castle" arrived at Las Palmas, the temperature of the holds on that day apparently not having been taken. But on December 30th, while still at Las Palmas, the temperature of No. 1 hold was ascertained to be 110; [195] of No. 2, 85; of No. 3, 85; of No. 4, 82; and of No. 5, 90; while the highest temperature of the air during the day was 65. It was not until January 14th that the temperature of No. 1 hold became fairly uniform with that of the others. No. 1 hold, because of its location, should under normal conditions be, if not cooler than the others, at least as cool as any of them. So that the high temperature of this hold must be attributed to some cause existing therein, and it is not now disputed that it was due to the heating of the bone-meal which was there stowed. It is in evidence that bone-meal does not ordinarily heat, and there was therefore no reason to anticipate that it would heat upon this occasion. There is no doubt, however, that it did heat, and that the heat generated by it had free access through the partly open hatch into No. 1 between-decks where libelants' merchandise was stowed. Everything indicates that the damage to this merchandise is to be attributed to the heat thus occasioned. The question then for determination is, whether or no, under the circumstances, the ship is excusable, either under the Harter Act, or because of the exemptions contained in the bill of lading. Section 1 of the Harter Act provides that it shall not be lawful to insert in a bill of lading any clause relieving from liability for loss or damage arising from

negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any merchandise, and that any words or clauses of such import shall be null and void.

Section 2 provides that it shall not be lawful to insert in any bill of lading any agreement by which the obligation of the owner of a vessel to exercise due diligence to properly equip, man, provision, and outfit such [196] vessel, and to make such vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided.

Section 3 provides that if the owner of any vessel shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents, or charterers shall be held responsible for damage or loss resulting from faults or errors in navigation or in the management of such vessel, nor shall they be liable for losses arising * * * from the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or resulting from any act or omission of the shipper or owner of the goods.

The provisions of the bill of lading must be read in connection with the sections of the Harter Act set out above and none of the exemptions apply, if the shipper prove that the damage arises from negligence in proper loading, stowage, custody or care of

the goods, and no exemption can do away with the obligation of the master properly to care for the cargo, while it is in his charge. It is true that when the damage is shown to result from some of the exempted causes, the burden is upon the shipper, to show negligence on the part of the ship. It is contended here that as to the No. 1 between-decks, the vessel was not seaworthy for the carriage of this cargo, because of the existence of all the elements in No. 1 hold to produce heat, even though such heating was not to be anticipated, and because free access of [197] such heat to No. 1 between-decks was permitted by leaving the hatch uncovered, and because the cargo in question was peculiarly susceptible to be damaged by heat. This is an interesting question, but one which I do not find necessary *to determine*. The merchandise in question, particularly the mineral water, was stowed in No. 1 between-decks because every one recognized the necessity of having it stowed where it might be kept as cool as possible and not be subjected to sudden and violent changes of temperature. Yet within five days after it was so stowed it was ascertained that the temperature of the hold immediately beneath it was nearly 50 degrees hotter than the temperature of the air, and nearly twenty degrees hotter than that of the other holds although it should ordinarily be cooler than any of them. This condition continued day after day, the officers knowing that the hot air of No. 1 hold had free access to No. 1 between-decks, and that the mineral water therein stowed was peculiarly susceptible to heat, and had been stowed there, according to

their own testimony, in order that it might be kept as cool as possible. Nothing was done to relieve the situation. Although the master testified that it would be absolutely impossible, without jettisoning the cargo, to get into any of the lower holds for the purpose of restowing cargo, and that when he found there was a difference of 25 degrees in temperature there was no place to take the cargo out, still it does not appear that it would have been difficult, certainly not impossible, during the fine weather then experienced, and particularly while lying at Las Palmas, to move or raise such portion of the cargo as was on the square of the hatch, and to close the hatch between No. 1 between-decks and No. 1 hold, so that the heated air of the latter might rise through the [198] ventilator without reaching the between-decks. If any of the merchandise in question was then found to be suffering injury because of heat, or because of moisture occasioned by bursting bottles, such portion might have been cared for by drying and airing it. The hatchway between No. 1 between-decks and No. 1 hold was twenty-four feet long and sixteen feet wide, and the depth of No. 1 between-decks was between seven and eight feet. The cargo stowed on this partly covered hatch consisted for the most part of baskets. It does not seem that any insuperable difficulty should attend the raising of such portion of a cargo of basket ware as covered a hatch twenty-four by sixteen feet to a depth of not exceeding eight feet, or that it would be at all necessary to jettison the same, and I cannot escape the conclusion

that the failure to make any effort whatsoever to relieve the conditions then known to exist was such negligence in the care of the cargo as will render the ship liable for the damage occasioned thereby. It is not impossible that the ship may be liable for other reasons suggested by counsel for libelants, but I am satisfied that she is liable for the reasons set forth.

A decree will therefore be entered fixing such liability, and the cause referred to the commissioner to ascertain and report the damage.

April 3d, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 3, 1915. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [199]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation et al.,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," etc.,
Respondent.

**Stipulation Waiving Reference [to United States
Commissioner].**

WHEREAS on April 3, 1915, the Court filed, in the above action, an opinion in which the steamer

“Skipton Castle,” was held liable for certain cargo damage occurring on said steamer; and

WHEREAS by order of said Court, the cause was referred to the United States Commissioner to ascertain and report the damages sustained by the libelants; and

WHEREAS the respective parties hereto have agreed upon the damages sustained by the libelants, exclusive of interest;

NOW, THEREFORE, it is stipulated and agreed, by and between the parties hereto, that said reference to the United States Commissioner be waived.

Dated October 15, 1915.

DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent.

[Endorsed]: Filed, Oct. 20, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [200]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation et al.,

Libelants,

vs.

The British Steamer “SKIPTON CASTLE,” etc.,
Respondent.

Stipulation (as to Damages Sustained).

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the damages suffered by the libelants in the above-entitled action were and are the following amounts set opposite their respective names:

The American Import Company, a corporation	\$1,712.60
Tillman & Bendel, a corporation.....	\$ 184.75
James de Fremery & Co., a copartnership.	\$ 575.
The Appolonaris Co., Ltd.....	\$1,208.25

DENMAN & ARNOLD,

Proctors for Libelants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Claimant and Respondent.

[Endorsed]: Filed, Oct. 20, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [201]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation et al.,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," etc.,
Respondent.

Stipulation (as to Interest on Stipulated Damages).

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties hereto, that the sums totaling \$3,680.60, as the damages suffered by the libelants and heretofore agreed to, do not include interest, and the respondent hereby reserves the right to make objection to interest being allowed by the Court.

Dated October 15, 1915.

DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent.

[Endorsed]: Filed Oct. 20, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [202]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation, TILLMAN & BENDEL, a Corporation, JAMES L. DE FREMERY and HENRI M. SUERMONDT, Copartners Doing Business Under the Firm Name of JAS. DE FREMERY & CO., THE APOLLINARIS CO., LTD., a Corporation,
Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her Engines, Tackle, Apparel and Furniture and

All Persons Intervening for Their Interest
Therein,

Respondents.

Final Decree.

Issue being joined herein, and this cause coming on duly to be heard upon the pleadings and proofs adduced by the respective parties, the libelants, to wit, the American Import Company, a corporation, Tillman & Bendel, a corporation, James L. De Fremery and Henri M. Suermondt, copartners doing business under the firm name of Jas. De Fremery & Co., and the Apollinaris Co., Ltd., a corporation, all being represented by their proctor, William Denman, Esq., and the claimant, Lancashire Shipping Company, Ltd., a corporation, being represented by its proctor Ira A. Campbell, Esq.:

And an order of this Court having been thereafter entered herein, whereby, among other things, it was adjudged that the respondent, the British steamer "Skipton Castle," was liable to the [203] libelants for the damages occasioned by reason of the matters and things in its libel set forth; and the matter having been referred to the United States Commissioner of this court to ascertain and report the said damage;

And the parties hereto having waived said reference to the United States Commissioner, and having agreed upon the damages, exclusive of interest, sustained by each libelant; and said damages agreed upon, together with interest at the rate of six (6) per cent per annum from May 1, 1911, to October 16, 1915, totaling:

American Import Company.....	\$2,171.01
Tillman & Bendel	234.20
Jas. de Fremery & Co.....	728.91
Appolinaris Company, Ltd.....	1,531.45

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the American Import Company, a corporation, recover against the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, the sum of Twenty-one Hundred and Seventy-one and 01/100 Dollars, (\$2,171.01), together with costs to be taxed; and that Tillmann & Bendel, a corporation, recover against the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, the sum of Two Hundred and thirty-four and 20/100 Dollars (\$234.20), together with costs to be taxed; and that James de Fremery and Henri M. Suermondt, copartners doing business under the firm name of Jas. de Fremery & Co., recover against the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, the sum of Seven Hundred and Twenty-eight and 91/100 Dollars (\$728.91), together with costs to be taxed; and that Apollinaris Company, Ltd., a corporation, recover against the British steamer "Skipton Castle," her engines, tackle, apparel and [204] furniture, the sum of Fifteen Hundred and Thirty-one and 66/100 Dollars, (\$1,531.66), together with costs to be taxed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, unless an appeal be taken from this decree within the time limited by the rules and practice of this court, the stipulators for costs

and value on the part of the claimant of said British steamer "Skipton Castle," shall cause the engagements of their said stipulations to be performed, or show cause within four (4) days after the expiration of the time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands for the amounts set forth in this decree.

Dated October 25, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 25, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk.

Entered in Vol. 6, Judg. and Decrees at Page 368.
[205]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation, TILLMAN & BENDEL, a Corporation, JAMES L. DE FREMERY and HENRI M. SUERMONDT, Copartners Doing Business Under the Firm Name of JAS. DE . FREMERY & CO., THE APOLLINARIS CO., LTD., a Corporation,
Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her Engines, Tackle, Apparel and Furniture, and

All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIM-
ITED, a Corporation,

Claimant.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the
Libelants in Said Cause, and to Messrs. William
S. Denman and Denman & Arnold, Their Proc-
tors:

You will please take notice that Lancashire Ship-
ping Company, Limited, a corporation, claimant and
respondent herein, hereby appeals from the final de-
cree made and entered herein in said cause on the
25th day of October, 1915, to the next United States
Circuit Court of Appeals for the Ninth Circuit, in
and for said Circuit, at the city and county of San
Francisco, State of California.

Dated December 28th, 1915.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Claimant and Respondents. [206]

Service of the within Notice of Appeal and receipt
of a copy is hereby admitted this 28th day of Decem-
ber, 1915.

DENMAN & ARNOLD,

Proctors for Libelants.

[Endorsed]: Filed Dec. 29, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [207]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMAN & BENDEL, a Corporation,
JAMES L. DE FREMERY and
HENRI M. SUERMONDT, Copartners
Doing Business Under the Firm Name of
JAS. DE FREMERY & CO., THE APOL-
LINARIS CO., LTD., a Corporation,
Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIM-
ITED, a Corporation,

Claimant.

Assignment of Errors.

Comes now Lancashire Shipping Company, a corporation, claimant and appellant herein, and says:

That in the record, opinion, decision and final decree in said cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors on which it relies, to wit:

I.

The District Court erred in entering the decree herein on date the 25th day of October, 1915, in favor of libelants and against said claimant.

II.

The District Court erred in holding and deciding that libelants had proved any negligence on the part of the claimant in the loading, stowing, custody, or care of libelants' merchandise, or in holding and deciding that claimant was negligent in the loading, stowing, custody or care of libelants' merchandise.
[208]

III.

The District Court erred in holding and deciding that libelants had sustained the burden of proof resting upon them when it affirmatively appears that the damages to the cargo were within the exceptions of the bill of lading under which said cargo was carried, to wit, decay, or the indirect causes thereof, contract with or smell or evaporation from other goods, including wrappers, however caused, heat, sweating, leakage, breakage and wastage.

IV.

The District Court erred in holding and deciding that the provisions of the bill of lading, which relieved the "Skipton Castle" from liability for loss or damage occasioned by decay, or the indirect causes thereof, contact with or smell or evaporation from other goods, including wrappers, however caused, heat, sweating, leakage, breakage and wastage, were not applicable to the case because as applied to the facts of the cause they are forbidden by Sections 1

V.

The District Court erred in holding and deciding that during the voyage of the "Skipton Castle" it was practical and possible to remove the cargo stowed in the upper holds for the purpose of restowing the cargo in the lower holds and thereby attempt to dry and air the libelants' merchandise.

VI.

The District Court erred in holding and deciding that the heat generated by the bone-meal which was stowed in No. 1 hold had free access through the partly open hatch into No. 1 between-decks hold, where libelants' merchandise was stowed.

VII.

The District Court erred in holding and deciding that the failure to remove such portion of the cargo as was on the square of the hatch and to close the hatch between No. 1 between-decks and No. 1 [209] hold, so that the heated air of the latter might rise through the ventilator without reaching the between-decks, was such negligence in the care of the cargo as will render the ship liable for the damage suffered by libelants.

VIII.

The District Court erred in holding and deciding that claimant was guilty of negligence in failing to remove such portion of the cargo as was on the square of the hatch and to close the hatch between the No. 1 between-decks and No. 1 hold so that the heated air of the latter might rise through the ventilator without reaching the between-decks.

IX.

The District Court erred in holding and deciding that the failure to make any effort whasoever to relieve the condition of high temperature known to exist in No. 1 between-decks hold was such negligence in the care of the cargo there stowed as will render the ship liable for the damage suffered by libelants.

X.

The District Court erred in not holding and deciding that part of the damage to the cargo stowed in No. 1 between-decks hold had been sustained prior to the vessel's arrival at Las Palmas, and that the ship was not liable for such damage so sustained.

XI.

The District Court erred in not holding and deciding that the damages sustained by libelants were caused by the inherent defect, quality or vice of the bone-meal caried on board the "Skipton Castle" and that the claimant, under Section 3 of the Harter Act, was not therefore liable for such damages.

XII.

The District Court erred in not holding and deciding that [210] claimant had exercised due diligence to make the vessel in all respects seaworthy and that the failure to close the hatch separating the lower No. 1 hold and No. 1 between-decks was an error or fault in the management of the vessel for which the ship, under Section 3 of the Harter Act, was not liable.

In order that the foregoing assignment of errors may be and appear of record, said claimant and ap-

pellant files and presents the same and prays that such disposition be made thereof, and the whole of said cause, as in accordance with the law and statutes of the United States in such cases made and provided; and that said claimant and appellant prays a reversal of the decree herein, heretofore made and entered in the above cause appealed from, and that it may have such other and further relief as shall be meet and equitable.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Claimant and Appellant.

[Endorsed]: Filed Mar. 17, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [211]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation, TILLMAN & BENDELL, a Corporation, JAMES L. DE FREMERY and HENRI M. SUERMONDT, Copartners Doing Business Under the Firm Name of JAS. DE FREMERY & CO., THE APOLLINARIS CO., LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her Engines, Tackle, Apparel and Furniture, and

All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIM-
ITED, a Corporation,

Claimant.

**Stipulation (and Order as to Original Exhibits for
Use on Appeal).**

IT IS HEREBY STIPULATED AND
AGREED by and between the parties hereto that all
of the exhibits introduced in the depositions taken
before the Commissioner in the above-entitled cause,
and the exhibits introduced at the hearing before the
above-entitled court, may be sent up to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit as original exhibits for the Apostles on Appeal
and need not be printed in said Court of Appeals.

March 30, 1916.

It is so ordered.

M. T. DOOLING,
District Judge.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondents.

[Endorsed]: Filed Mar. 31, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [212]

**Certificate of Clerk, U. S. District Court, to
Apostles on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 212 pages, numbered from 1 to 212, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The American Import Company, a Corporation, etc., vs. The British Steamer "Skipton Castle," etc., No. 15,156, as the same now remains on file and of record in the office of the clerk of said District Court; said transcript on appeal having been prepared pursuant to and in accordance with "Praecipe for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorneys for respondent and appellant herein. All exhibits introduced in this cause are transmitted herewith in their original form, under separate certificate.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Twenty-two Dollars and Twenty Cents (\$122.20), and that the same has been paid to me by the attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of March, A. D. 1916.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath, Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled
3/31/16. C. W. C.] [213]

[Endorsed]: No. 2774. United States Circuit Court of Appeals for the Ninth Circuit. Lancashire Shipping Company, Limited, a Corporation, Claimant of the British Steamer "Skipton Castle," Her Engines, Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein, Appellant, vs. The American Import Company, a Corporation, Tillman & Bendell, a Corporation, James L. De Fremery and Henri M. Suermondt, Copartners Doing Business Under the Firm Name of Jas. de Fremery & Co., The Apollinaris Company, Limited, a Corporation, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed March 31, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMAN & BENDELL, a Corporation,
JAMES L. DE FREMERY and
HENRI M. SUERMONDT, Copartners Doing
Business Under the Firm Name of JAS.
DE FREMERY & CO., THE APOLLIN-
ARIS CO., LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIM-
ITED, a Corporation,

Claimant.

**Stipulation and Order Extending Time for
Docketing Cause on Appeal [to February 28,
1916].**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
hereto that the time for printing the record and fil-
ing and docketing this cause on appeal in the United
States Circuit Court of Appeals for the Ninth Cir-
cuit may be, and the same is hereby, extended to and
including the 28th day of February, 1916.

Dated San Francisco, California, January, 27,
1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondents.

It is so ordered by the Court.

Dated January 27, 1916.

WM. W. MORROW,
Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. The American Import Company, a Corporation et al., Libelants, vs. The British Steamer "Skipton Castle," etc., Respondents. Lancashire Shipping Company, Limited, a Corporation, Claimant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jan. 28, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 15,156.

THE AMERICAN IMPORT COMPANY, a Corporation, TILLMAN & BENDELL, a Corporation, JAMES L. DE FREMERY and HENRI M. SUERMONDT, Copartners Doing Business Under the Firm Name of JAS. DE FREMERY & CO., THE APOLLINARIS CO., LTD., a Corporation,

Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her Engines, Tackle, Apparel and Furniture, and All Persons Intervening for Their Interest Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIMITED, a Corporation,

Claimant.

**Stipulation and Order Extending Time for
Docketing Cause on Appeal [to March 29, 1916].**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby extended to and including the 29th day of March, 1916, it being understood and agreed that said Apostles will be filed in time for hearing at May term of above Court.

Dated San Francisco, California, February 26,
1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondents.

It is so ordered by the Court.

Dated February 28, 1916.

WM. W. MORROW,
Judge.

[Endorsed]: In the Circuit Court of Appeals for the Ninth Circuit. The American Import Company, a Corporation et al., Libelants, vs. The British Steamer "Skipton Castle," etc., et al., Respondents. Lancashire Shipping Company, Ltd., a Corporation, Claimant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Feb. 28, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE AMERICAN IMPORT COMPANY, a Corporation,
TILLMAN & BENDELL, a Corporation,
JAMES L. DE FREMERY and
HENRI M. SUERMONDT, Copartners Doing
Business Under the Firm Name of JAS.
DE FREMERY & CO., THE APOLLIN-
ARIS CO., LTD., a Corporation,
Libelants,

vs.

The British Steamer "SKIPTON CASTLE," Her
Engines, Tackle, Apparel and Furniture, and
All Persons Intervening for Their Interest
Therein,

Respondents,

LANCASHIRE SHIPPING COMPANY, LIMITED,
a Corporation,

Claimant.

**Stipulation and Order Extending Time for
Docketing Cause on Appeal [to March 31, 1916].**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
hereto that the time for printing the record and fil-
ing and docketing this cause on appeal in the United
States Circuit Court of Appeals for the Ninth Cir-
cuit may be, and the same is hereby extended to and
including the 31st day of March, 1916.

Dated San Francisco, California, March 29, 1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelants.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondents.

IT IS SO ORDERED BY THE COURT.

WM. W. MORROW,
Judge.

Dated March 29, 1916.

[Endorsed]: In the United States Circuit Court for the Ninth Circuit. The American Import Company, a Corporation, et al., Libelants, vs. The British Steamer "Skipton Castle," etc., et al., Respondents. Lancashire Shipping Company, Limited, a Corporation, Claimant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Mar. 29, 1916. F. D. Monckton, Clerk.

No. 2774. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to Mar. 31, 1916, to File Record Thereof and to Docket Case. Refiled Mar. 31, 1916. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals**For the Ninth Circuit**

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

VS.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

*Appellees.***BRIEF FOR APPELLANT.**

EDWARD J. McCUTCHEN, *Filed*
IRA A. CAMPBELL, *May 20 1916*
McCUTCHEN, OLNEY & WILLARD, *F. D. Monckton*
Proctors for Appellant.

Filed this.....*day of May, 1916.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

vs.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L.
DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an action for damage to cargo.

The British steamer "Skipton Castle", a modern cargo vessel, loaded in Antwerp, for carriage to San

Pedro and San Francisco, a quantity of bottled mineral water (apollinaris, etc.), willowware baskets and general cargo. On arrival at the aforesaid ports of discharge, a large part of the bottles was found to have been broken, and the water wasted and the baskets rotted.

The cargo was shipped under bills of lading which stipulated that the ship should not be liable for loss or damage occasioned by, *inter alia*, decay, or the indirect causes thereof, heat, sweating, leakage, breakage, wastage, etc.

The damaged cargo was stowed in No. 1 'tween decks, being the cargo compartment farthest forward and immediately beneath the ship's weather deck. In No. 1 hold, below No. 1 'tween decks, was stowed a large quantity of bone meal. Shortly after the commencement of the voyage, the bone meal heated from unknown causes, and the temperature in No. 1 'tween decks apparently so raised that the bottles broke from the gas pressure thereby generated from the mineral water.

The voyage outward from Antwerp and Hull was without special incident, save the heating of the bone meal. The steamer left Antwerp on December 18, 1910, called at Hull on the following day for coal and stores, and finally departed on her voyage on the 21st. She stopped for coal at Las Palmas on the 29th, getting under way again on the 30th. She subsequently arrived at San Pedro on February 22, 1911, and at San Francisco on March 4th.

The libel alleged a shipment of the cargo aboard the steamer in good order and condition, and its delivery

in bad order and condition. The damages were charged to have been inflicted while the cargo was in the possession of the steamer, by water and breakage and leakage of the bottles, due to bad stowage and unseaworthiness. Existence of some of the damage was admitted, other allegations thereof denied, but it was alleged affirmatively by appellant (claimant) that the damage was within the aforesaid exceptions of the bills of lading exempting the steamer from liability for loss or damage by breakage, wastage, decay, sweating, heat, etc.

The case was tried largely on depositions, although some evidence was heard in open court. Following its submission, the District Court rendered its opinion, holding claimant liable for the damage because of the failure of those on board the steamer, while at Las Palmas, to remove the cargo stowed on the 'tween decks hatches, close the hatches, and care for any merchandise then found to be suffering injury because of heat or moisture, by drying and airing it. From the decree thereafter entered this appeal was duly prosecuted.

Specifications of Errors.

Errors have been assigned in the Apostles on Appeal to the decree of the District Court. We have grouped them for convenience under the following specifications:

I.

The court erred in not holding and deciding that the damages were within the exceptions of the bills

of lading and that appellees had not sustained the burden of proving that the damages were caused by negligence on the part of the carrying steamer. (Assignments of Errors I, III, IV, V, VI, VII, VIII, IX, X.)

II.

The court erred in holding and deciding that there was any negligence on the part of the carrying steamer in the loading, stowing, custody or care of the cargo. (Assignments of Errors I, II, IV, V, VI, VII, VIII, IX, X.)

III.

The court erred in not holding and deciding that due diligence had been exercised to make the steamer in all respects seaworthy, properly manned, equipped and supplied, and that if there was any negligence causing or contributing to the damages to said cargo, it was error or fault in the navigation or management of the vessel within the exemptions of the third section of the Harter Act. (Assignment of Errors XII.)

IV.

The court erred in not holding that the damages were caused by the inherent defect, quality or vice of the bone meal, within the exemptions of the third section of the Harter Act. (Assignment of Errors XI.)

The Argument.

I.

THE EVIDENCE SHOWING THAT THE DAMAGE TO THE CARGO WAS BREAKAGE, WASTAGE AND DECAY CAUSED BY HEAT, WITHIN THE EXCEPTIONS OF THE BILLS OF LADING UNDER WHICH THE CARGO WAS SHIPPED, THE BURDEN OF PROVING THAT SUCH DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE CARRYING STEAMER RESTS UPON APPELLEES.

The evidence showed that the damage to the bottles was breakage, wastage of their contents, rotting of the straw covers, and damage to the wrappers, all of which was caused by the heating of the bone meal. (Ap. pp. 75, 77, 105, 106.) The damage to the willowware was decay. (Ap. pp. 61, 62-68, 70, 73.)

The bills of lading stipulated that the ship should not be liable for loss or damage occasioned by, *inter alia*, decay, or the indirect causes thereof, injury to wrappers, 'however caused, heat, sweat, leakage, breakage, wastage, etc.

The evidence thus clearly establishing that the damage to the merchandise was plainly within exceptions of the bills of lading, the burden of proving that the damage was caused by negligence on the part of the carrying steamer rests upon appellees. This principle of law is well settled. It was so held in

Jahn v. The Folmina, 212 U. S. 354; 53 L. ed. 546,

wherein Mr. Justice White said:

"Of course where goods are delivered in a damaged condition plainly caused by breakage, rust

or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be prima facie within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But, in a case like the one before us, where showing an injury by sea water does not, in and of itself, operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. For the distinction between the two, see *The Henry B. Hyde*, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114, 116; *The Lennox*, 90 Fed. 308, 309; *The Patria*, 68 C. C. A. 397, 132 Fed. 971, 972.”

In

The Bohemia, 35 Fed. 756,

a libel for damages was dismissed as the causes of the injuries were “decay” and the “prolongation of the voyage”, within the exceptions of the bills of lading, and no negligence or failure of duty on the ship’s part was shown by the libelant.

The rule was followed by this court in

The Henry B. Hyde, 90 Fed. 114,

wherein Circuit Judge Gilbert dismissed the libel, as the damage was shown to have been breakage within the exemptions of the bill of lading, and no evidence was offered to prove that it was caused by negligence.

In

Wolff v. The Vaderland, 18 Fed. 733, 739,

District Judge Brown said:

“When the damage complained of is ascertained to be within any of the exceptions of the bill of lading, the burden of proof is then changed, and the carrier is not liable, unless it be shown by the shippers ‘that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods; for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty’.”

The Circuit Court of Appeals for the Second Circuit, enforcing the rule in

The Baralong, 172 Fed. 220,
said of it:

“Under both bills of lading we think that, in view of the exception of damage from heat, the burden rested upon the libelant to show that the carrier was negligent in stowing or ventilating the cargo or otherwise. This he failed to establish.”

Again, in

The Koranna, 214 Fed. 172,

District Judge Hazel stated the rule as follows:

“It is well settled, I think, that, whatever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property.”

The Neidenfels, 174 Fed. 293;

The Konigen Luise, 185 Fed. 479.

The breakage of the bottles, and the decay of the straw cases and willowware, were caused by the heating of the bone meal. Exemption from liability for damage by heat was stipulated in the bills of lading. Such damage, therefore, falls within operation of the burden of proof rule.

The New Orleans, 26 Fed. 44;

The Pearlmore, 9 Asp. Mar. Cas. 540.

No grounds exist for removing the case at bar from the application of the rule thus settled in the maritime law. It follows, therefore, that appellees are not entitled to recover for the damage in question unless a fair preponderance of the evidence shows that it was caused by the negligence of the steamer. This has not been established.

II.

THE EVIDENCE FAILS TO SHOW THAT THE DAMAGE TO THE CARGO WAS CAUSED BY THE STEAMER'S NEGLIGENCE.

The Cargo was Carefully Loaded and Properly Stowed.

The evidence shows that the bone meal was loaded at Antwerp and stowed in No. 1 lower hold (Ap. p. 141) under the supervision of the officers of the ship, and Captain Baines, a surveyor of many years' experience. (Ap. pp. 120, 145, 185.) It was taken aboard in the winter time (Ap. p. 126), from covered sheds, the sides of which were open (Ap. p. 170). At least part of it was loaded as it came down to the wharf, and was taken from there aboard ship. (Ap. p. 198.) The

weather was damp and sultry. (Ap. p. 138.) It rained while the vessel was at Antwerp (Ap. pp. 138, 183), but the bone meal was not loaded in the rain, and the hatches were kept covered during the rain, so that no water could get into the holds. (Ap. pp. 141, 144-5, 183, 190, 192.) The bone meal was not taken aboard damp or wet, but was in good condition so far as external examination showed (Ap. pp. 169, 176, 191, 192, 193-4), nor did it get wet after it was loaded (Ap. pp. 61, 185, 191-2). The bone meal was stowed over sacks of pebbles which were dry (Ap. pp. 194-5, 200), and was protected against dampness from the sweating of the ship's sides by dunnaging with mats (Ap. pp. 196-197).

The Mineral Water was Properly Stowed.

The mineral water was stowed in the forward part of the 'tween decks of No. 1 hold, and the willowware and general cargo in the hatchway and a few in the wings of the same compartment. (Ap. pp. 121-2, 131-2, 138-9, 162-4.)

It was the consensus of opinion of every witness questioned that No. 1 'tween decks was the best part of the ship in which to stow the mineral water. (Ap. pp. 46, 82, 134, 137, 159, 167, 168, 171, 175, 178, 216-17, 240.)

There was not an iota of evidence to the contrary.

The Ventilation of the Cargo was Efficient.

The 'tween deck compartment and the No. 1 lower hold were equipped with standard ventilators, which were carefully and attentively used throughout the

voyage to care for the cargo. (Ap. pp. 123-6, 131-2, 142-4, 146-7, 150-2, 156, 163-7.) The hatches were removed for ventilating purposes whenever weather permitted, and awnings were spread over the fore deck while in the Tropics. (Ap. pp. 132-4, 138, 142-3, 146, 156, 164-7, 190.) The ventilators to No. 1 'tween deck and lower hold were as large as those to No. 2 hold, a larger compartment (Ap. p. 150), and were of equal size to those on similar cargo carrying vessels. (Ap. pp. 81, 160, 205, 214-6, 233-4.)

**The Heating of the Bone Meal was Not Attributable
to Negligence of the Steamer; Nor was It a
Substance Likely to Heat.**

The bone meal heated, but from what source is unknown. It may have been due to a dampened condition not disclosed by external appearances, or it may have been due to an imperfect curing of the product. (Ap. pp. 61-69.) Whatever the cause, the evidence certainly establishes that it gave no appearance of a condition which might cause it to heat; nor was it an article likely to heat.

The uncontradicted testimony of Mr. Bunker, agent of the Pacific Mail S. S. Co., which has continuously, for many years, carried great quantities of bone meal in its trans-Pacific steamships (Ap. pp. 55-60); of Mr. Watkins, superintendent of the Hawaiian Fertilizing Company, which has imported many tons, both from Calcutta and Europe (Ap. pp. 223-8); of Captain Woodside, manager of the San Francisco Stevedoring Company, who has discharged large shipments arriving

at the port of San Francisco (Ap. pp. 44-6), and of Captains Baird and Holliday, who have been officers in vessels carrying it as cargo, particularly in the West Indies trade (Ap. pp. 81-2, 234-5), all disinterested witnesses, was to the effect that *bone meal is not a cargo likely to heat*. Of all the great quantities transported over all the seas, those witnesses had never known it to heat. On the other hand, no evidence of any kind was offered by libelants of its ever having heated in course of transportation.

Summarizing: There was No Evidence of Negligence in Loading, Stowage or Care of Cargo or of Unseaworthiness of Vessel.

The evidence thus adduced discloses no negligence on the part of the owners, officers or crew of the "Skipton Castle", with respect to the cargo, or any unseaworthiness in her hull, machinery or equipment. On the contrary, it shows that the vessel was a modern cargo carrying steamer, equipped with approved ventilators. The bone meal showed no evidence of wet or dampened condition, or of its likelihood to heat. True, it was loaded in sultry and damp weather, but that was a climatic condition over which claimant had no control, and must have been known to every shipper. Every care was taken to see that the cargo, including the bone meal, was not wet by rain, either while awaiting shipment, or while being loaded, or after it was on board, for the cargo was stored under covered sheds and was not loaded in the rain. The precaution

of closing the hatches was taken when it did rain, so that none reached the cargo compartments of the vessel. The cargo was properly stowed under the supervision of the ship's officers and an experienced surveyor. Upon the voyage the holds were regularly ventilated with due care and diligence, and everything done that could be done to assure the cargo's safe transportation. Indeed, no evidence of unseaworthiness, or of the bone meal being taken aboard in a dampened or wet condition or of improper stowage, or of failure to care for the cargo on the voyage, was offered by libelants.

The evidence likewise shows that the bone meal was not *per se* such a substance as claimant or the officers or crew of the vessel could anticipate was likely to heat. Experience has not shown us that it would, so that it cannot be said that it was negligence, or improper stowage, to stow the bone meal in No. 1 lower hold and the mineral water and willowware in No. 1 'tween decks.

In these circumstances, therefore, we respectfully submit that appellees have completely failed to sustain the burden of proof resting upon them, in that they have not shown any negligence with respect to the cargo, which should deny to claimant the benefit of the exemptions of the bills of lading. It not having been shown that the damage to the cargo was caused by the steamer's negligence, the libel should be dismissed.

III.

**THE DISTRICT COURT ERRED IN HOLDING THAT LIBELANTS
WERE ENTITLED TO RECOVER.**

The District Court held that libelants were entitled to recover because the steamer did not take out the cargo stowed over the 'tween deck hatch, and close that hatch leading to the lower hold, and dry and air the merchandise. We quote the salient portions of the opinion that we may have the position taken by the court clearly before us:

“The merchandise in question, particularly the mineral water, was stowed in No. 1 between decks because every one recognized the necessity of having it stowed where it might be kept as cool as possible and not be subjected to sudden and violent changes of temperature. Yet within five days after it was so stowed it was ascertained that the temperature of the hold immediately beneath it was nearly 50 degrees hotter than the temperature of the air, and nearly twenty degrees hotter than that of the other holds although it should ordinarily be cooler than any of them. This condition continued day after day, the officers knowing that the hot air of No. 1 hold had free access to No. 1 between decks, and that the mineral water therein stowed was peculiarly susceptible to heat, and had been stowed there, according to their own testimony, in order that it might be kept as cool as possible. Nothing was done to relieve the situation. Although the master testified that it would be absolutely impossible, without jettisoning the cargo, to get into any of the lower holds for the purpose of restowing cargo, and that when he found there was a difference of 25 degrees in temperature there was no place to take the cargo out, still it does not appear that it would have been difficult, certainly not impossible, during

the fine weather then experienced, and particularly while lying at Las Palmas, to move or raise such portion of the cargo as was on the square of the hatch, and to close the hatch between No. 1 between decks and No. 1 hold, so that the heated air of the latter might rise through the ventilator without reaching the between decks. If any of the merchandise in question was then found to be suffering injury because of heat, or because of moisture caused by bursting bottles, such portion might have been cared for by drying and airing it. The hatchway between No. 1 between decks and No. 1 hold was twenty-four feet long and sixteen feet wide, and the depth of No. 1 between decks was between seven and eight feet. The cargo stowed on this partly covered hatch consisted for the most part of baskets. It does not seem that any insuperable difficulty should attend the raising of such portion of a cargo of basket ware as covered a hatch twenty-four by sixteen feet to a depth of not exceeding eight feet, or that it would be at all necessary to jettison the same, and I cannot escape the conclusion that the failure to make any effort whatsoever to relieve the conditions then known to exist was such negligence in the care of the cargo as will render the ship liable for the damage occasioned thereby. It is not impossible that the ship may be liable for other reasons suggested by counsel for libelants, but I am satisfied that she is liable for the reasons set forth."

Bearing in mind that the rule which the District Court should have applied, and which we respectfully submit it failed to do, imposed upon libelants the burden of proving that the injuries to the cargo by breakage, wastage and decay, caused by heat, were due to the steamer's negligence, the pertinent inquiry is: *Did the evidence show that the damage in question was caused*

by a negligent failure to take out the cargo stowed over the 'tween deck hatch and close the hatch and dry and air the merchandise? Unless a fair preponderance of the evidence establishes that the injuries were so caused, the District Court erred. We submit that the evidence does not so show it.

The "Skipton Castle" left Antwerp on December 18, 1910, and arrived at Hull on the night of the 19th. On completion of her loading and coaling, she sailed from Hull on the morning of December 21st. The temperatures of the various holds were first taken on December 22nd, and they were found to be 101° in No. 1 lower hold; 83° in No. 2; 82° in No. 3; 84° in No. 4, and 87° in No. 5. Thereafter the temperatures prevailed as follows:

	No. 1	No. 2.	No. 3.	No. 4.	No. 5.
Dec. 23	100°	84°	83°	85°	86°
Dec. 24	101°	85°	84°	84°	88°
Dec. 25	103°	83°	83°	82°	88°
Dec. 26	110°	85°	85°	83°	92°
Dec. 27	104°	84°	85°	85°	93°
Dec. 28	104°	85°	85°	85°	92°

The steamer came to anchor at Las Palmas on the 29th of December, and immediately commenced coaling. This was completed on the following day at 2:45 p. m., and at 4:40 p. m. anchor was weighed and the ship proceeded. Temperatures were taken and found to be:

No. 1	No. 2.	No. 3.	No. 4.	No. 5.
110°	85°	85°	82°	90°

Thereafter they were recorded as follows:

	No. 1	No. 2.	No. 3.	No. 4.	No. 5.
Dec. 31	104°	84°	84°		93°
Jan. 3	99°	86°	87°	89°	85°
4	98°	86°	85°	86°	88°
5	97°	87°	85°	85°	89°
6	97°	86°	86°	86°	88°
7	95°	86°	87°	86°	87°
8	93°	86°	87°	85°	87°
9	94°	88°	87°	87°	87°
10	92°	87°	85°	84°	88°
11	92°	85°	85°	86°	84°
12	92°	83°	83°	83°	82°
13	90°	82°	82°	84°	80°
14	84°	84°	85°	84°	84°

Thus it appears that No. 1 lower hold in which was stowed the bone meal had a temperature ranging from 101° on December 22nd to 110° on the 26th, and then to 104° on December 28th, at least seven days prior to the arrival of the "Skipton Castle" at Las Palmas. On the day she left Las Palmas it was as high as it had been three days before she reached that place. Thereafter it gradually lowered until on January 14th the temperature was normal.

The "Skipton Castle" was a modern cargo tramp steamer, constructed of steel. For at least seven days prior to her arrival at Las Palmas, the cargo in No. 1 lower hold was in an abnormally heated condition. Separating that hold from No. 1 'tween deck space was a steel deck through which ran four metal ventilators, two at

the forward end and two at the after end. (Ap. pp. 124-5.) It was on that deck and about those ventilators that the damaged cargo was stowed.

Now, it is a necessary conclusion from the conditions thus existing that the heat of No. 1 lower hold was conducted to the 'tween deck space above through the medium of the steel deck and the metal ventilators. Thus the 'tween deck space was unquestionably heated, with the resultant injuries to the cargo. The mineral water, stowed on top of this heated steel deck, was susceptible to heat, and as a consequence of its existence in No. 1 'tween deck space, the bottles broke.

Manifestly, it is impossible to say that all of the damage to the cargo *was not* caused by the conducting of the heat of the lower hold to the 'tween deck space by the metal deck and ventilators. It is likewise impossible to say that all of the damage to the cargo *was not* completed prior to the arrival of the steamer at Las Palmas. But, unless it was not all so caused, and unless damage was, in fact, caused subsequent to her arrival at Las Palmas, then *it follows that any failure on the part of the steamer to take at Las Palmas the course suggested by the lower court* (and not by any witness) *did not cause the injuries*. And if it did not, the District Court erred, for under the rule of law by which claimant's liability is to be determined, the burden of proving that the damage resulted from negligence, (the cause assigned by the District Court), is upon appellees.

Such burden has not been sustained, for the evidence does not show that the damage was not all completed

before the steamer reached Las Palmas, or that the heat which caused the damage was not entirely conducted to the 'tween deck space by the metal decks and ventilators. The court, then, should have found that appellees had not sustained the burden of proof resting upon them.

So far as the evidence discloses, appellees (libelants) never, during the course of the trial, conceived of the thought that the ship was negligent as found by the court. Such negligence was not charged in the libel, but improper stowage and unseaworthiness were alone alleged. Rather than criticising the officers of the steamer for not having closed the 'tween deck hatch, the burden of libelants' complaint, during the course of examination, was that the hatch was not opened further so as to allow a freer circulation of air into the lower hold. (See App. 156-157.)

The rule, to the benefit of which claimant is entitled unless a settled principle of law is to be set aside, imposes upon appellees the burden of showing that negligence caused the damage falling within the exceptions of the bills of lading. The District Court held that such negligence existed in that the cargo on the square of the hatch (No. 1 'tween deck) was not moved or raised and the hatch between No. 1 between decks and No. 1 hold closed so that the heated air of the latter might rise through the ventilator without reaching the between decks, and any injured cargo dried and aired. Such charge of negligence must be grounded upon a fair preponderance of the evidence, and yet there is no evidence, we respectfully submit, to sustain it. The only evidence

adduced which referred to the question as to whether the cargo could have been so raised is the following:

“Mr. DENMAN. Q. What did you do when you found there was 25 degrees difference in temperature?

A. *I could not do anything.*

Q. Could you not have taken any cargo out and gone down?

A. *There was no place to take cargo out.*

Mr. CAMPBELL. What date was that, Mr. Denman?

Mr. DENMAN. It was on the 30th of December.

Q. Did you ever have that happen before?

A. Heating?

Q. Yes?

A. No, sir.

(DEPOSITION OF J. NELSON CRAVEN.)

Redirect Examination.

Mr. CAMPBELL. Q. Was it possible for you, Captain, to get into any of the lower holds of your vessel while they were filled with cargo for the purpose of restowing it?

A. *No, sir, absolutely not, without jettisoning the cargo.* (Ap. pp. 184-5.)

* * * * *

Q. As a matter of fact you did all you could to better that condition when you found it hot there?

A. *We could not better the condition that the hold was in, free ventilation.*” (Ap. p. 186.)

That evidence does not show that the cargo could have been treated in the manner in which the court finds it should have been. It is the only evidence bearing upon the matter, and yet the court says that it could have been done, despite the fact that the ship’s experienced master, whose judgment is not called in question by any witness, stated that it was impossible without jettisoning to get to the lower hold, which would have been reached

by removing the cargo that the court says should have been raised. There is no evidence in the entire record that it could have been done, and yet to sustain the burden of proof, evidence in fair preponderance thereof was required to be adduced. We submit, then, that the court erred when it held that negligence existed as found, and that its ruling disregards the burden of proof rule.

If libelants had entertained the thought that the cargo could have been so readily handled on a full laden ship, and that failure to do so was negligence, witnesses would have been called and at least some proof offered. But not a word. The record is silent. No witness was called to challenge the testimony of the master. Without evidence in the record upon which to base its finding, the District Court would set aside the only evidence that was introduced. This is not the adherence to the rule to which claimant is entitled.

That the court was seemingly appreciative of the want of the required evidence in the record appears from its suggestion of a "moving" of the cargo in the square of the hatch, in the face of the fact that the evidence shows that the 'tween deck space was filled, and the baskets were stowed in the square of the upper deck hatch (Ap. p. 122) so that it could not be moved. The fact that suggestion is made of a "moving" and a "raising", when the record shows that the moving could not have been done, demonstrates that there was no certain evidence to which the court was there pointing.

The court's conclusion was that the ship should be held "liable for the damage occasioned thereby", re-

ferring to such damage as resulted from a failure to raise the cargo and close the 'tween deck hatch, and prevent the hot air of the lower hold from reaching, through the hatch, the cargo that was injured in the 'tween deck space. There is no evidence that any cargo in the 'tween deck space was injured by heated air rising through the 'tween deck hatch.

The record shows that the beams and some of the covers were laid on the 'tween deck hatch; that the hatchway was fairly tight—only the spaces between the cases, the broken stowage. (Ap. pp. 138-9.) That this must have been compact stowage is evidenced from the fact that it was required to withstand the rolling and tossing of the ship, during the seas incident to a voyage around Cape Horn to San Francisco. The evidence is that the upper deck hatch, immediately above the 'tween deck hatch, was kept open to admit of as much air as was possible to the compartments. Now, one of the commonest known facts of science is that hot air rises. This being true, it is scientifically certain that with the upper deck hatch open, whatever heated air came from the lower hold through the spaces between the cargo stowed on the 'tween deck hatch, immediately ascended through the upper hatch, and did not spread throughout the filled 'tween deck space, for the open hatch above naturally formed an air shaft or flume. If the heated air did not so ascend then it failed to act in accordance with its governing scientific principle. Certainly there is no evidence that it failed. How, then, can it be asserted that such heated air injured the cargo as the court has found? There not only is not any

evidence of it, but the testimony elicited by appellees fails to show that any of the baskets stowed immediately over the 'tween deck hatch, and in the direct pathway of the ascending heated air, were injured. The baskets that were damaged were those stowed in the after portion of No. 1 hold near the top where the after ventilators were. The mineral water was forward of the hatch on the 'tween deck. This appears from the following excerpts:

“Q. I will hand you what purports to be the stowage plan of the ‘Skipton Castle’ and ask you to look at it?

A. Do you want me take into consideration everything in this plan?

Q. No, just the forward part; and ask you if that in general shows the stowage plan of the cargo?

A. It does. On the fore part here it was all mineral water. This felting was all abaft of that, in the wings of the hatch coamings and on the after part, all abaft of the cargo, this mineral water. Apparently by this plan we have got mineral water stowed on top of the felt, which was not so at all. That would be very bad stowage in that case.

Q. Were any of the baskets stowed abaft of the hatch?

A. Yes, sir; there were a few stowed abaft of the hatch on top of some general goods.

Q. What was stowed in the square of the hatch?

A. I could not exactly say what was stowed in the square of the hatch, just general goods, felting, and a few barrels of wool grease on the after end.

(Ap. pp. 122-3.)

* * * * *

Q. Your deck plan shows that these baskets that came to San Francisco were stowed in the after portion of the No. 1 hold at the top of the hold, weren't they; in the after end of No. 1 hold near the top?

A. Yes, sir.

Q. And that is where the ventilators open into No. 1 hold, is it not?

A. Yes, sir, the after ventilators?

Q. Yes?

A. Yes, sir.

Q. And those are the intake ventilators, whenever you can make them?

A. Yes, sir.

Q. These were the baskets that came out injured and mildewed?

A. Yes, sir.

Q. It was only the baskets in the hold with the mineral water that were injured on this trip?

A. Yes, sir.

Q. The baskets in the other hold came out all right, didn't they?

A. Yes, sir." (Ap. p. 199.)

In the course of its opinion, the District Court said:

"Although the master testified that it would be absolutely impossible without jettisoning the cargo to get into any of the lower holds for the purpose of restowing the cargo, and when he found there was a difference of 25° in temperature, there was no place to take the cargo out, still it *does not* appear that it would have been difficult, certainly not impossible, during the fine weather then experienced, and particularly while lying at Las Palmas to move or raise such portion of the cargo as was on the square of the hatch and *to close the hatch* between No. 1 'tween decks and No. 1 hold, so that the hot air of the latter might rise through the ventilator without reaching the 'tween decks."

It is upon that finding that the entire decision is grounded, but, we submit, it disregards the burden of proof rule.

Now mark that the court held that *it did not appear* that it would have been difficult, and certainly not im-

possible, etc. to close the hatch between No. 1 'tween decks and No. 1 hold. And *because it did not so appear*, the court held that appellant was liable. The clear effect of that ruling was to impose upon libellant the burden of showing that it would have been difficult, or impossible, to do the act which the District Court would have required. The effect of the decision is to hold *that because appellant did not make it appear* that it would have been difficult, or impossible, to move or raise the cargo and close the hatch, *it was to be held liable*. Plainly that impressed upon appellant the burden of proving that the damage did not result from the moving or the raising of the cargo, and the closing of the hatch.

But the burden of proof, under the rule, was upon appellees to show that the negligence of the vessel caused the damage. Appellees had not sustained the burden, and the court's decision impliedly so finds, and yet such was a condition precedent to their right of recovery.

Furthermore, there is no evidence that if the baskets and general cargo in the square of No. 1 'tween deck hatch could have been removed, as the master said was impossible, the hatch between No. 1 'tween decks and No. 1 hold could have been closed so as to prevent the passage of the heated air. The ship was completely loaded with cargo, all of her compartments being stowed full. All of the hatch covers on the 'tween deck hatch were not laid as it was not customary to do so. Where the hatch covers not so laid were stowed on board the ship does not appear from the record, nor was any

inquiry thereof made by appellees during the trial. Certainly reason teaches us that they were not carried on the upper deck of the vessel, where they would be exposed to the wash of the seas, and so far as the evidence discloses they may well have been, and probably were, stowed on the 'tween decks in the wings of the hold beneath or back of other cargo. If they were not accessible, then they could not have been used to close the hatch, and the hatch could not, in fact, have been closed had the cargo been removed. But, as we have pointed out, the record is devoid of any evidence showing that means were available to close the hatch, as the District Court would require it.

The burden of proving that the hatch could have been closed, if that were the proper course to have been pursued, was upon appellees, and yet the court, by its decision, has, in effect, held appellant responsible because it did not show that the hatches could not be closed. In other words, the court has manifestly disregarded the burden of proof rule which is applicable to the case, and has condemned appellant because it has not sustained the converse of the burden which rests upon appellees.

We respectfully submit that, on the record, the District Court erred in holding that there was any negligence on the part of the carrying steamer in the custody and care of the cargo, and in not deciding that appellees had not sustained the burden of proving that the damages were caused by the negligence of the steamer.

IV.

**THE FAILURE TO REMOVE THE CARGO STOWED IN THE
'TWEEN DECKS AND THE FAILURE TO CLOSE THE 'TWEEN-
DECKS HATCH, IF NEGLIGENCE, WAS NEGLIGENCE IN THE
MANAGEMENT OF THE VESSEL.**

On the voyage from Antwerp to Las Palmas and the ports of discharge, the 'tween decks hatch was not tight, as was customary on ships of that type, as well as on all cargo-carrying vessels. Covers were placed across the beams of that hatch. Upon those were placed a general cargo. That cargo was so stowed that slight spaces existed between the cases in which the cargo was contained. By this means the ventilation of the compartments was increased.

The District Court held the steamer liable for damages to appellees' cargo because of the omission of the officers of the vessel to make the 'tween deck hatch tight so that neither the air passing from the open main deck hatch could reach the lower hold or the heat from the lower hold could reach the 'tween decks compartment. For thus omitting to do something in the management of the ship after the voyage commenced, the shipowner, who had performed its duty by making the vessel in all respects seaworthy, is condemned.

Obviously, any mismanagement of the ship or her appliances in navigation or otherwise is a want of proper care as regards the cargo. As said by this court, speaking through Judge Ross, in

Corsar v. J. D. Spreckels & Bros. Co., 141 Fed.
260, 263.

“Undoubtedly a fault or error in the navigation or management of a vessel carrying cargo may, and often does, result in injury to the ‘custody, care and delivery’ of the cargo. * * * But, if the owner of the vessel has performed his duty by making the vessel in all respects, seaworthy for the voyage it undertakes, it is plain that neither he nor the vessel can be held responsible for any merely incidental damage resulting to the cargo from a fault or error in its subsequent navigation or management, if section 3 of the act is to be given any force.”

Here, we are not dealing with any act which caused any damage to the cargo. On the contrary, we are alone concerned with the failure at a port of call for coaling to rearrange a vessel that was by the shipowner made seaworthy when the voyage commenced. If the vessel was seaworthy in that condition at the commencement of the voyage, it would seem to follow that the failure to change that condition is an omission to perform something in connection with the management of the vessel after the shipowner had performed his duty of sending out a seaworthy vessel.

It is true that the reason for a change in the arrangement of the vessel would be for the benefit of the cargo, as distinguished from the rearrangement of a part of the vessel in no wise connected with the cargo, but that distinction is apparent in many of the cases and still the courts have held the error to have been in the management of the vessel, rather than negligence in the care and custody of the cargo.

Thus the failure to operate pumps, when it is known that water which is certain to damage cargo is in a

cargo compartment has been held to be negligence in the management of the vessel. Obviously the working of the pumps would have a direct bearing upon relieving the damaged condition of the cargo. It would of course be negligence in the caring for the cargo, but it would also be negligence in the management of the vessel.

Judge Brown had such a question presented to him in

The Ontario, 106 Fed. 324, 327.

In that case (which was affirmed in *Grubnan v. The Ontario*, 115 Fed. 769), a ballast tank of an ocean steamer sprung a leak during the voyage, and the water accumulated in the hold above in sufficient quantity to damage the cargo stowed therein. The leak was known to the engineer and carpenter, but both failed to report it to the chief officer, to give it proper examination, or to use the pump with sufficient frequency to prevent an accumulation of water in the hold. The pump was sufficient, and a proper use of it would have prevented injury to the cargo. Judge Brown held that the damage to the wool was due to the failure of the men to give the leak sufficient attention and to use the pump with sufficient frequency, saying:

“But no attempt was made to ascertain whether there was any accumulation of water over the limbers, or any damage arising to the cargo. The continuance of the leak was evident from the necessity of pumping every watch. * * * The omission to report the leak to the chief officer so that an examination might be made for the protection of the cargo, and neglect to keep the pump going enough to prevent accumulation of water and the swelling of the limber coverings, were

negligence in the 'management of the ship' during the voyage."

Again, a similar question was presented in

The British King, 89 Fed. 872, 873,

where a vessel in very rough weather took in considerable water, thereby causing damage to the cargo. It was *then known that 14 inches of water was in the bilges*. Yet, soundings were not taken and the pumps were not used. The court, in that case, said:

"It was a very plain lack of ordinary prudence, and hence was negligence, not to make any soundings during the following 10 hours up to 6 a. m. of the next day, during which time an accumulation of water at the same rate as during the preceding four hours must manifestly exceed 20 inches, which, as all knew, would be dangerous to the cargo. The accumulation of water from 6 to 10 p. m. was extraordinary; and if not of itself indicative of the specific cause afterwards ascertained, it was at least plainly indicative of the necessity of more frequent soundings and pumping during the continuance of heavy weather. * * * The failure to take soundings and to apply the pumps as the known facts showed to be necessary, was therefore the final and immediate cause of the damage. But for this negligence the ship and owners are not liable under the third section of the Harter Act; because it was negligence in the 'management of the ship.' *The Sandfield*, 79 Fed. 371; *The Mexican Prince*, 82 Fed. 484; *The Silvia*, 15 C. C. A. 362. 68 Fed. 230."

While it may be that the failure to relieve the danger to the cargo, then known to exist, by removing the water, is, in a certain sense, negligence in the care and

custody of the cargo, it is also negligence in the management of the ship after the voyage commenced.

For the same reason the failure to relieve the danger to appellees' cargo, then known to exist, by making the 'tween decks hatch tight and thereby prevent any heated air, generated by the bone meal, from passing through the spaces of the cargo stowed on the hatch is, if negligence at all, similarly negligence in the management of the ship.

It would undoubtedly be negligence in the care of the cargo if the goods were damaged because of the negligence of the officers of the vessel in leaving off the hatches in a storm, by reason of which the seas entered and damaged the cargo. Such negligence, however, would come within the application of the rule announced in

The Silvia, 171 U. S. 452, 465, 43 L. Ed. 241,

where the Supreme Court, in speaking of the words navigation and management, within the meaning of the Harter Act, said:

They

"might not include stowage of cargo not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship."

If a shipowner is thus relieved from the negligent omission of his employees to prevent water from getting

into a cargo compartment, assuming of course that he had performed his duty of sending out a seaworthy vessel, why should not a shipowner who has also sent out a seaworthy vessel be relieved from the omission of his employees to try to remedy a condition brought about, not by negligence but by something over which he had no control, the inherent vice of other cargo carried aboard the vessel? There is no material difference between the failure to close the hatch so as to prevent water from reaching the cargo, which would of course be known to damage cargo, and the failure to close and make tight the 'tween decks hatch so as to prevent the heated air from reaching the cargo. Particularly is this true in view of the fact that it might very well be said that the 'tween decks hatch was not the only means of the heat of the lower hold passing on to, or reaching, the cargo stowed in the 'tween decks. The steel deck itself, upon which appellees' cargo was stowed, was the best conductor of any heat generated and discharged by the inherent vice of the bone meal stowed in No. 1 lower hold.

A question calling for a construction of the Harter Act, where there was a failure to remove a part of the cargo at an intermediate port, was presented to Judge Brown in

The Guadeloupe, 92 Fed. 670, 671.

In that case, a vessel put into an intermediate port for repairs occasioned by stress of weather. It was contended that, while at that port, the cargo should have been removed for the purpose of examining the ship so that the damage to the cargo might be lessened

or prevented. In answer to that contention, that learned judge said:

“But the question whether the cargo should be removed, and to what extent, for the purpose of examining the interior of the ship, thereby incurring certain considerable expense, was a question for the exercise of the master’s judgment. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the ‘management’ of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master’s determination.”

The same principle was announced by the Circuit Court of Appeals for the Second Circuit in

United States v. New York & O. S. S. Co.,
216 Fed. 61, 71,

where the government contended that the shipowner was not relieved from liability by the Harter Act for damage to its cargo, for the reason that the cargo *was not properly cared for during the voyage*; that is, while the ship was at Algiers for 36 hours no inspection was made to discover whether or not any of its cargo had been damaged, and no inspection was made to remedy any damaged or defective condition of the vessel which might be found by said examination. The court in that case said:

“But the government also contends that the petitioner is not relieved by the provisions of the Harter Act for the reason that the cargo was not properly cared for during the voyage. It seems that the ship on its way to Manila reached Algiers

on November 12th which was subsequent to the storm which the vessel had encountered, and that she stopped there about 36 hours taking on coal. It was discovered after the storm was over that water had entered No. 2 bilge, and also No. 4 bilge and the pumps were at once set to work and the water was pumped out. It was not known that any water had drained into No. 3 hatch where the government cargo was stowed. When the ship reached Manila it was discovered that the storm had strained some of the hatches, and among others hatch No. 3, and that sea water had entered and damaged the government's merchandise.. The government complains because while the ship was at Algiers no inspection was made to discover whether water had entered hatch No. 3, or to determine at what point the water found in the bilges had entered. But it seems to us that, the vessel being seaworthy when she began her voyage, the failure to make the inspection at an intermediate port, if such an inspection ought to have been made, must be regarded as a fault in management of the ship under the third section of the Harter Act. *The Guadeloupe* (D. C.), 92 Fed. 670 (1899). That act provides that if the owner of any vessel transporting merchandise to or from any port in the United States exercises due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, agent, or charterer shall become or be held responsible for damage or loss resulting from faults or errors of navigation or in the management of said vessel. The act was 'intended to relieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipment after his ship has gone below the horizon and away from his personal observation.' Benedict's Admiralty, sec, 229."

We respectfully submit that if the omission to close the 'tween decks hatch was negligence, it was negligence

in the management of the vessel for which the appellant is relieved from liability by section 3 of the Harter Act.

V.

THE DAMAGE TO APPELLEES' CARGO RESULTED FROM THE INHERENT DEFECT, QUALITY OR VICE OF THE BONE MEAL.

Section 3 of the Act of February 13, 1893, known as the Harter Act, in part, provides as follows:

“That if the shipowner of any vessel transporting merchandise or property * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from * * * the inherent defect, quality or vice of the thing carried.”

The learned court below has found that the cause of the damage to appellees' cargo was the heat generated from the bone meal stowed in No. 1 lower hold. It did not hold that it was negligence to so stow the bone meal, or that there was any reason to suppose that bone meal would heat. On the contrary, as before pointed out, bone meal had never before been known to heat. Consequently there was no reason to anticipate that it would heat upon this voyage.

It is to be noted that the temperature of No. 1 lower hold was, for several days before reaching Las Palmas, much higher than that of the other holds. If, therefore, that heat was the cause of the breaking of the

bottles in which was contained apollinaris water, that damage must have occurred because of the inherent defect, quality or vice of the bone meal long before the vessel reached the intermediate port of Las Palmas.

The primary and proximate cause of appellees' damage, therefore, is something for which the shipowner is relieved from liability by section 3 of the Harter Act. Nothing that could be said to have been negligence on the part of the ship until the vessel's arrival at that port made the danger operative. The efficient cause or *causa causans* of the loss was the heat of the bone meal,—something for which the shipowner is not in any manner responsible.

We respectfully submit that appellant is not liable for the damages to appellees' cargo which resulted from the inherent defect, quality or vice of the bone meal.

For the reasons assigned, we respectfully submit that the decree of the lower court should be reversed, with directions to dismiss the libel with costs.

Dated, San Francisco,

May 26, 1916.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

VS.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

WILLIAM DENMAN,
DENMAN AND ARNOLD,

Proctors for Appellees.

Filed this.....day of June, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

JUN 27 1916

F. D. Monckton

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LIMITED (a corporation),

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BRIEF FOR APPELLEES.

The Issues and Burdens of Proof.

The pleadings in this case admit receipt of the Apollinaris, wickerware and agate ironware in good condition and their delivery in damaged condition. With

the issue thus framed, the burden was on the claimant of the ship to show that its negligence did not cause the injury. It attempted to meet this burden through the establishment of three affirmative defenses: (1) that the injuries arose from excepted causes in the bill of lading, i. e., "heat" producing an explosion of the bottles and therefrom "water" and "sweat"; (2) that the injuries arose from a vice inherent in certain cargo other than that sued for, i. e., the decomposition of an animal fertilizer stowed in a separate hold situate below the between decks compartment; and (3) that the injuries, if by any fault, arose through a fault not in the care of the cargo but in the management of the vessel, i. e., leaving this perishable cargo to stew in the heat and moisture created by this decaying fertilizer for some seven weeks after the heat was discovered.

In attempting to establish the first proposition, the first deposition taken showed that the heating of the compartment in which those fragile and destructible goods were stowed arose from causes existing in the ship when the cargo was loaded in her,—the failure to close the bottom of the compartment in which it was stowed and thus shut out any heat from the hold below, and the stowage of the decaying fertilizer under it. That the principles of decay were in the fertilizer before sailing is incontrovertibly shown in this first deposition by the fact that when first examined, only four days after sailing, it had already heated till it was

at least 17 degrees warmer than the next compartment and 50 degrees warmer than the outside air. The decay and heating were caused by moisture (64, 65) and it was shown that no water was made by No. 1 hold, in which the fertilizer was stowed (185).

The Supreme Court has squarely laid down that where the cause of injury excepted in the bill of lading concerns the matters controlled by section 2 of the Harter Act, i. e., loading and stowage of the vessel and her preparation for sea, the fact that the injury falls within the exception of the bill does not shift the burden of proof, but that at all times the burden remains on the vessel to show seaworthiness and diligence in stowage.

Martin v. The Southwark, 191 U.S. 1 at 6 and 7, 12 and 13, 16 and 17, reversing *The Southwark* (C. C. A.), 108 Fed. 880.

The opinion on pages 6 and 7 as well as 12 and 13 should be read to understand the full effect of the principle established, but the following are the portions specially applicable:

“It is argued that appellees are not claiming the benefit of the Harter act, but rely upon the contract in the bill of lading to exempt them from liability in the absence of affirmative proof of negligence. (page 16.)

“To permit the stipulations of this bill of lading to cut down the statutory requirements of §2 of the Harter act would be to allow the parties to enforce a contract in violation of the positive terms of the statute. As was said by Mr. Justice White,

of somewhat similar provisions in the contract before the court in *The Kensington*, 183 U. S. 263, 46 L. Ed. 190, 22 Sup. Ct. Rep. 102: 'It is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or its servants'." (page 17.)

"In the district court, which judgment was affirmed by the circuit court of appeals, it was held that the burden of proof, in view of the stipulation of the bill of lading in this case, was not upon the carrier, but upon the shipper, and that there could only be a recovery in the event that the shipper had shown, by satisfactory evidence, negligence upon the part of the carrier.

* * * * *

"It is urged that the findings in both the district court and the circuit court of appeals, that the loss did not arise from want of proper refrigerating apparatus, but was due to a breakdown in the machinery after the voyage was begun, are findings of fact in the courts below which should be held conclusive here. There are observations in the opinions of the learned judges consistent with the view that it was found that the loss was due to a breakdown in the machinery after the voyage had begun, and ordinarily such findings as to matters of fact are followed in this court, *but the case below was tried upon a theory which ignored the initial duty of the carrier to use due diligence to provide a seaworthy vessel, properly equipped for the purpose intended. The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier.*

“As we have before stated, the right of the carrier to be exonerated in the respects named in the Harter act depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. The burden of proof being upon the carrier to show that he has exercised due diligence to provide a seaworthy vessel at the time he received the meat and started upon the voyage, the question arises, Was this duty discharged? ‘This due diligence required’, said the Chief Justice, in delivering the opinion in *International Nav. Co. v. Farr & B. Mfg. Co.*, 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. Rep. 591, ‘diligence to make the ship in all respects seaworthy, and that, in our judgment, means due diligence on the part of the owner’s servants in the use of the equipment before the commencement of the voyage and until it is actually commenced’. An examination of the record convinces us that the respondent did not show by the weight of the testimony that this initial duty had been discharged.”

Martin v. The Southwark, 191 U. S. 1 at 12, 13.

This decision clearly disposes of the cases cited on pages 5 to 8 of appellant’s brief, which may be distinguished on the ground that in proving the ships within the phraseology of the exceptions in those cases, it was not at the same time shown that the cause arose in making the vessel fit and seaworthy for the voyage.

The burden of proof, as determined by the pleadings, has therefore never shifted from the claimant of the ship, the appellant, as to any of the issues in the case and, since it comes into this court as a trial *de novo*, it was incumbent on the claimant to maintain this

burden of proof on each and all of them. The fact that the lower court has decided one of them adversely to it, certainly cannot improve claimant's position as to the others.

At the trial in the lower court, we urged, and we now urge here:

1. That the shipowner has not maintained its burden of proof that the ship was seaworthy as to the compartment in which these fragile articles were stowed, it being admitted that the flooring in the hatch, a part of the ship's structure as distinguished from mere dunnage for the cargo, and completing the between decks hold as a supposedly cool compartment, had not been laid, but that the hatch floor had been left partly open. That the animal fertilizer stowed in the hold next below had in it the active principles of decay and heat when the vessel sailed and hence the between decks compartment left open to such heat was unseaworthy for the carriage of charged mineral waters and other cargo with it likely to be injured by water and sweat.

2. That the fact that this unseaworthiness was latent does not excuse the shipowner, since it has failed to place in its bill of lading any exception of latent unseaworthiness.

3. That the shipowner has not maintained its burden of proof, that it was good stowage for a voyage twice through the tropics to place wickerware, susceptible to rot, and fine ironware, likely to rust, in the same compartment with bottles containing explosive mineral

waters which have considerable breakage on normal voyages, and when, as here, the bottles are stowed under the ventilators and heated by the upflow of warm air from the lower hold and then, on a change in the wind, suddenly chilled by the cold midwinter air blowing down the vents from the outside.

4. That the shipowner has not maintained its burden of proof that it exercised due diligence to make the vessel fit for the voyage, as required by the Harter Act, it appearing that the fertilizer was stowed in part, nine days and the mineral water eight days before the vessel sailed and that the fertilizer had greatly heated within four days after sailing, and no evidence being offered of any due diligence in inspecting the vessel before sailing which failed to disclose the heating. For all the evidence shows the crew or officers knew of some heating before sailing and did nothing to remedy it.

5. That the ship has not maintained its burden that the damage to the cargo was caused by any inherent vice in the appellees' cargo as distinguished from the cargo of other persons.

6. That, regardless of burden of proof, it affirmatively appears that the captain was negligent in caring for the cargo in failing (a) to close the between deck hatch at once on December 22; (b) to close it at Las Palmas; (c) in letting the cargo stew for seven weeks in this steaming compartment without doing anything for its relief.

7. That the owner's primary obligation under section 1 of the Harter Act, as to the care and custody of the cargo, continues during the entire voyage and that it is only when the care of the cargo is a mere incident of management of the ship, *qua ship*, that it ceases to be controlled by the first section of the Act.

We might have treated points 6 and 7 first, because Judge Dooling's decision is based on them, and this court's agreement with him on these would obviate the necessity of considering the other five. We have, however, arranged the brief in logical and chronological order, however. The failure to maintain the burden of proof as to the other issues raised would entitle libellant to recover, even if Judge Dooling had not rendered his very sensible decision that the captain did not properly care for the cargo.

It will be noted by the court that neither appellant's brief nor its argument fairly discusses the majority of the points raised in the case and hence, that we have no chance in this brief to meet our opponent's contentions on issues on which it has the burden of proof. This, we take it, was its duty, and we beg that if we are so advised we may answer in a supplementary brief any new matter it offers in its reply.

I.

The shipowner has not maintained its burden of proof that the ship was seaworthy as to the compartment in which these fragile articles were stowed, it being admitted that the flooring in the hatch, a part of the ship's structure as distinguished from mere dunnage for the cargo, and completing the between deck's hold as a supposedly cool compartment, had not been laid, but that the hatch floor had been left partly open. The animal fertilizer stowed in the hold next below had in it the active principles of decay and heat when the vessel sailed and hence the between decks compartment left open to such heat was unseaworthy for the carriage of charged mineral waters and other cargo with it likely to be injured by water and sweat.

At the argument of this appeal, counsel stated and reaffirmed that there was no evidence in the record, that it was customary to complete the forward between decks compartment by laying the planking of the hatch or otherwise closing it by boards or canvas. On the contrary it is clearly proved by our opponent's experts that the No. 1 hold and the forward between decks are separate compartments of the ship, intended for different kinds of cargo, each with a complete ventilator system, intentionally distinct from that of the other.

The ventilator pipes from No. 1 hold passed through the forward between decks compartment and out to the upper deck where they terminated in the four ventilator hoods. The ventilator pipe out of the top of the between decks fitted around the outside of the pipes from the hold and through it passed in and out a *separate* current of air.

One of these experts, Captain Keame, after showing the identity of his vessel's No. 1 hold and his forward between deck compartment with those of the "Skipton Castle", testified regarding the purpose and desirability of having the two compartments completely separated so that no air could pass from one to the other, as follows:

"Q. Why do you have this pipe—as I understand it this pipe leading from the lower hold up to the upper deck through the between deck is solid so that none of the air from that pipe could get in the between deck space?

A. Yes, sir.

Q. *Is that to prevent any foul matter getting between the between deck?* A. *Yes, sir.*

Q. As I understand it, the air coming from the lower hold goes right up through there and would not stop at the between deck? A. It would drift up.

Q. Suppose you had great heat down there you could not expect that heat to drift back through, it would naturally go out?

A. Our experience shows it does go out, we never look for that.

Q. That is the reason why it is made solid?

A. Yes, sir.

Q. That is to say, made solid from the lower hold to the outside deck? A. Yes, sir.

Q. Everything passes between the between deck hold to the outside space? A. It does not do that.

Q. You want it to do that? A. No, sir.

Q. *Your idea is to prevent the heating or moisture from getting into the between decks?* A. Yes, sir."

Deposition Captain Keame, Ap. 219.

Captain Holliday says:

"Q. So that none of that ventilation from the lower hold can get into the 'tween decks, that is the idea, is it not? A. Yes, it passes right up.

Q. And out of the ship? A. Yes.

Q. The idea being to make two separate holds between the lower hold and the 'tween decks and to carry the ventilation right through out from the lower hold.

A. Yes, it is telescoped.

Q. I mean the purpose of that is to give a separate ventilation?

A. For both the lower hold and the 'tween decks.

Q. So as to keep them apart; if you have warmer ventilation in the hold, it will go up and out?

A. Yes, it passes right up.

Q. I mean the purpose is to have it go up there instead of having it mix through the 'tween deck space?

A. That is right.

Q. Your idea is that that forward 'tween deck space is the best place to stow mineral waters? A. I do.

Q. *Because there you have the cooling effect of the outside air from the ventilators?* A. Yes.

Q. *And you can separate it off from the heat of the lower hold?* A. Yes."

Ap. 83, 84.

"Q. Now, is it not another reason why you desire to stow the mineral waters in the 'tween deck space, *that you want to avoid extremes of temperature?*

A. Well, the 'tween deck space is about *as equal in temperature as you can get.*

Q. You are getting off, then, *from the heat below*, and you simply have the *equalizing temperature* of the air on the outside? A. Yes."

Ap. 84, 85.

“Q. You do not expect to ventilate through these hatches, you ventilate through the ventilators?

A. That is what they are there for.

Q. You don't ventilate through those hatches?

A. No.”

Ap. 89, 90.

Of course to make this separate ventilation effective, the hatch between the between decks compartment must be closed. This was not done on this occasion. The mate frankly admitted that warm air arising from the hold below would ventilate through the few boards that had been put in (Ap. 192, 138, 139).

The captain of the “Skipton Castle” describes the advantages of the forward between decks compartment for the carriage of carbonated waters as follows:

“Q. In your judgment, Captain, was there any other portion of the vessel than No. 1 fore tween decks where a more *uniform temperature* can be maintained?

A. No, sir.

Q. Why not?

A. It is furthest away from the boilers, it is the smallest space with the biggest amount of ventilation, which means you can keep it at a *more normal heat* than any other part of the ship, except No. 5 between decks which carries vibration. I could not say which has the advantage of capacity.”

Ap. 171.

All the lower holds are affected by the vessel's boilers and furnaces, for we find that No. 2 hold, which was stowed when the temperature was around 40°, had risen to 83° when the air was around 53°. This warm air would of course rise through the hatch into the compartment above if not sealed off and destroy the

advantage of the equable temperature due to the large ventilation in that smaller hold.

The efficient cause, therefore of the explosion of the Apollinaris and filling of the between decks with moist air, and the consequent rotting of the wrappers and of the wickerware and rusting of the enamel, was not the stowage of the fertilizer in the lower hold—but the failure to complete the ship's structure at the bottom of the between decks compartment and hence force the hot air of the lower hold out through its proper vent. The stowage of the fertilizer need not have been disturbed in the slightest way to make the compartment above seaworthy. The failure to make the hatch tight, a matter of ship structure, was the *causa causans* of the loss.

The question then arises, is a ship's compartment seaworthy for the carriage of fragile and explosive mineral waters, where her structure is so arranged before and at the time of sailing that it must *necessarily* in the course of the voyage, be flooded with streams of very hot air from below, alternating (as the wind blew down the ventilators) with very cold air from above, and where, necessarily, the water will be caused to explode, and sweat and rust damage occasioned?

“The term ‘seaworthy’ is relative. A ship leaky in her deck may be seaworthy for carrying stone, iron, coal, and very many other things, even more valuable in respect to avoirdupois. But it cannot legitimately be contended that a ship is seaworthy, as to perishable articles, when it leaks in such a manner and degree as to cause damage to

a very large proportion of such articles by a process plain to all on board, and obvious throughout the voyage; the damage to flour in this case showing itself, in several instances, in the form of paste oozing through the cracks of the barrels. A ship may be seaworthy as to one sort of cargo, and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship, and carried on a voyage, the master guaranties the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy quoad that article, and, if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the *non sequitur* that it is capable of carrying safely, and without damage, some other article of a different character."

The Thames, 61 Fed. 1014 at 1022 (C. C. A.).

"The term 'seaworthy' in its earlier use, it must be admitted, was not of as broad or extended signification as under the present advanced state of commerce and transportation facilities, but it now has relation to the article carried, and *the different compartments of the ship* and their particular use as well as to the navigability of the ship. *The Southwark*, supra; *The Thames*, 61 Fed. 1014, 10 C. C. A. 232; *The British King* (D. C.) 89 Fed. 872."

The Indrapura, 178 Fed. 591 at 594.

A ship's refrigerating compartment is unseaworthy for the carriage of meat if at sailing the cooling machinery is defective.

The Southwark, 191 U. S. 1.

The presence of foot and mouth disease in a hold into which cattle are loaded makes it unseaworthy for the carriage of cattle.

Tattersall v. Nat. SS. Co., 12 Q. B. D. 1014.

A compartment is unseaworthy to carry butter without cooling apparatus.

Howson v. Atl. Transport Co., 1903, 1 K. B. 114.

The No. 1 hold of a vessel was held unseaworthy for the carriage of sugar because the cover over the man-hole leading into the ballast compartment beneath was not made tight before putting in the cargo, whereby moisture reached the sugar stowed above.

American Sugar R. Co. v. Rickinson, 120 Fed. 591.

We cannot see how these cases can be distinguished from the case at bar. All that was necessary to protect the cargo in the between decks was a proper completion of the floor of the compartment by the hatch boards which are a part of the ship's equipment. Hermetically sealing by tarpaulins, even, was not necessary as the fine ventilator system for the hold below would have taken care of the hot air, had not the large hatch opening drawn the air by another channel. In so far as the heat of the rotting fertilizer is concerned, it is not a matter of stowage at all. The goods in the between decks could have been stowed exactly as they were. The only change necessary to avoid the damage was not in the stowage but the completion of the ship's structure across the floor of this compartment.

In response to counsel's suggestion that the mineral waters would burst anyhow because stowed on the steel floor and around the steel ventilators, we remind him of what seems to have been forgotten, that the deck was dunnaged (130). If the ventilators, with their frequent changes of temperature and hence sweating, were not matted as the sides of the compartment were (130), it was admitted bad stowage. With the perfect ventilation from four large ventilators in this small compartment (150), any warmth which might have come *through* the deck plates would have been easily taken care of.

In response to counsel's suggestion that the compartment was seaworthy because heat would pass directly up from the lower hold out the opening of the *two* hatch boards taken off the upper hatch at each end, we point out that these were off only in the day time and in fair weather. It is apparent that even when these boards were off the draw of the ventilators, opening high above the decks, with their cowls especially constructed for an intake and outflow of air, would bring the hot air from the lower hatch over to them and hence to the explosive mineral waters stowed beneath them.

In response to the further suggestion that the unseaworthiness of the compartment was not the cause of the injury to the baskets and ironware because they were not stowed in the line of the flow of hot air from the hatch below to the hatchboard opening above, we say that it was not the direct application of heat which damaged these goods. It could and would not do so. It

was the alternations of heat and cold that broke the bottles whose water dampened the air, which caused moulding of the baskets and rusting of the ironware. Besides a large part of the baskets were stowed right over the open hatch (139, 193).

In our next section we will show that once it appears that the compartment is unseaworthy, it is immaterial whether or not the captain was conscious of it. The ship is in any event liable, in the absence of a waiver of the warranty of seaworthiness in the bill of lading.

II.

The fact that this unseaworthiness was latent does not excuse the ship, since it has failed to place in its bill of lading any exception of latent unseaworthiness.

It was for a time contended that the Harter Act *ipso facto* relieved the ship owner from liability for latent defect in her structure or equipment. This contention, however, was squarely disposed of by the Supreme Court in *The Carib Prince*, where it was held that, so far from relieving the ship from liability for latent defect, it was merely permissive to the owner to do so by a specific provision in his bill of lading, limiting his guarantee of the vessel's seaworthiness.

The Carib Prince, 170 U. S. 655.

There was no such permission in the bills of lading here. The United States Supreme Court stated

this liability for latent defect in *The Caledonia*, 157 U. S. 131, in the following language:

“In our opinion, the shipowner’s undertaking is not merely that he will do and had done his best to make the ship fit, but that the *ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage*, and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.”

The Caledonia, 157 U. S. 124 at 131.

In fact, a defect in a cargo compartment, such as a port improperly fastened but which could have been fastened after sailing, makes the vessel *unseaworthy only if the officers are unconscious of it*.

“They believed it to be securely closed and that it would remain so during the voyage. It was neither intended nor expected that it would require or receive any attention at sea.”

International Nav. Co. v. Farr, 181 U. S. 218.

Whereas if the port was known to be open, or expected to be examined for securing in rough weather, and through failure to close it water entered the hull in rough weather, the defect is not unseaworthiness but failure in management of the vessel.

The Silvia, 171 U. S. 462.

It is therefore submitted that the claimant and appellant has entirely failed to maintain its burden of proof that it had performed its undertaking to furnish a seaworthy vessel, and that the latent defect (if it was latent) in the between decks compartment, is in fact affirmatively shown to be the cause of the injury.

III.

The shipowner has not maintained its burden of proof, that it was good stowage, for a voyage twice through the tropics, to place wickerware, susceptible to rot, and fine ironware, likely to rust, in the same compartment with bottles containing explosive mineral waters which have considerable breakage on normal voyages, and when, as here, the bottles are stowed under the ventilators and heated by the upflow of warm air from the lower hold and then, on a change in the wind, suddenly chilled by the cold mid-winter air blowing down the vents from the outside.

As we have shown, the Supreme Court holds that where the facts raise a question as to making the vessel and her cargo fit for the voyage, i. e., involve section 2 of the Harter Act, the owner must maintain the burden of proof that he has used due diligence as to her stowage.

Martin v. The Southwark, 191 U. S. 1, see *supra*, first chapter of this brief.

It is a matter of common knowledge and experience that mineral waters will have a certain amount of explosion even under the ordinary temperatures of voyages twice through the Tropics (241), and that this likelihood increases under sudden changes of temperature. It is for this reason that they were put in the forward between decks, which was alleged to be the coolest place with the most equable temperature, al-

though we shall show by the mate's admissions that, for this season, it was probably the hottest.

Mr. Anderson, the Apollinaris agent, who had experience with over 250 shipments of carbonated waters, says:

“Q. You would not attempt to say that instructions have been given to this line of vessels?

A. I would not. I only speak of that generally to show the shipping instructions are to keep it fore and aft under the water line and away from the boilers so as not to be subject to heat.

Q. What you mean to say is that it is your desire that it be stowed in the coolest portion of the vessel?

A. In the coolest portion of the vessel and away from the boilers.

Q. And as I understand it where it would not be exposed to changes of temperature?

A. Not rapid changes.”

Ap. 112.

“Q. It would be true of all carbonated water?

A. All carbonated waters, anything carbonated should be stored in a cool place, whether champagne or water.

Q. And is the same thing true in regard to sudden changes of temperature?

A. Any highly carbonated or highly charged liquid.”

Ap. 113.

Captain Craven says:

“Q. In which of the holds, the lower hold or the between deck hold, is a more uniform temperature?

A. In her between deck hold.

Q. If you were to return to Antwerp and bring out another cargo of the same character as this one, would you alter the stowage of the mineral water?

A. No. 1 between decks fore parts.

Q. Would you change the stowage from what it was on this voyage? A. No, sir.

Q. In your judgment is there any other place in the ship in which they can be stowed as well as they could be in No. 1 fore between decks. A. No, sir.

Q. Why is that?

A. *It maintains an even temperature, as even as you can get it in a ship's hold."*

Ap. 175.

Captain Keame says:

"Q. Take mineral waters that are affected by heat, would you stow them in No. 1 hold?

A. No. 1 between deck.

Q. If you could? A. Yes, sir.

Q. What is the reason for that?

A. Well, it is farthest away from the boilers for one thing and experience has taught us it is the best place to put them.

Q. Mineral waters are liable to blow up if they get too hot? A. They are.

Q. Have you ever had that experience. A. No, sir.

Q. The chief thing is to get them in the coolest place? A. Yes, sir.

Q. Because they are liable to burst from the heat?

A. Yes, sir."

Ap. 217.

Captain Halliday says:

"Q. Now, is it not another reason why you desire to stow the mineral waters in the 'tween deck space, that you want to avoid the extremes of temperature?

A. *Well the 'tween decks space is about as equal in temperature as you can get.*

Q. You are getting off, then, from the heat below, and you simply have the equalizing temperature of the air on the outside? A. Yes."

Ap. 84, 85.

"Of course we know mineral waters will break themselves, without any assistance from us."

Captain Baird, Ap. 241.

“Q. Would it ever raise your hold to 90 degrees?

A. If your between decks is over the top of the boilers, yes.

Q. You would not put your mineral waters in there?

A. No.

Q. You think that would be too high a temperature to be a safe thing? A. Yes.”

Captain Woodside, Ap. 54.

The temperature record shows that in the first day out from Hull, No. 2 hold, which is separated from the engine room by No. 3 hold, had a temperature of 83° when the cargo had been stowed during a temperature of 40°, and that when in the cold waters of South America, and long after the fertilizer had cooled, the warmth of No. 1 hold was about the same as No. 2. So we could have expected that, in the absence of the fertilizer, the heat coming up from No. 1 hold through the open hatch would have been around 83°, or about 30 degrees warmer than the outside air (Ap. 153).

It is admitted that *in rough weather* No. 1 forward between decks is the poorest of all for ventilation, because its ventilators often have to be closed on account of spray coming over the bow, while the other holds had their ventilators still operating. Indeed this was one of the mate's ways for accounting for the greater heat in No. 1 hold over the others.

“A. I know there was quite a big difference. I did not know it was 20 degrees. I did not probably look at what the temperature was.

Q. What was the cause of that?

A. The only thing I can think about it is, *it was in bad weather when this change occurred, and the hatches were covered up, had to be battened down.* That is the

only time I can think of, allowing it to run up in temperature like that.

Q. Would not all the other hatches be battened down at the same time? A. Yes, sir.

Q. Why should this hold be 20 degrees hotter than the others? There is no explanation for it, is there?

A. No, sir, there is not.

Q. Excepting that there was something in the cargo that was heating? That is the only explanation you have for it? There was something inside heating the cargo?

A. *It might have been that she was taking a little water over the forecastle head, and would stand the after hatches being uncovered and not the forward hatches.*

Q. The forward hatch would very often have to be covered up on account of taking water?

A. Especially if the wind is ahead; more so than No. 2 or No. 3 or No. 4 or No. 5 hatch.

Q. That is likely to make a difference of 20 degrees in the temperature of the holds?

A. *That is likely to make a very marked change.*

Q. So that when the head wind is on your forehold is likely to be 20 degrees hotter than the other holds?

A. I would not say 20 degrees. *There is likely to be a marked change in the temperature between that hold and any other hold, as it is covered up. I did not think it would be 20 degrees.*

Q. That would occur whenever you had a head wind?

A. A change in the temperature, yes."

Ap. 148, 149.

We thus find that none of the benefits which all the experts claimed for the cool ventilation and even temperature of forward between decks were obtained but, on the contrary, the waters were exposed to very rapid oscillation of temperature between the hot air from the lower hold and the cold air blown down the ventilators from time to time, as the vessel met more or less strong breezes. For instance, in a following breeze at about the speed of the vessel, there would be

no circulation of air forced through the vents from the outside, but the warm air would be steadily rising through the open hatch and the mineral water heated up. When the wind changed, a sudden stream of cold air would be admitted. So also in cold, pleasant weather after bad weather when the ventilators are opened up, all the accumulated heat from the lower hold is met by the cold blast from the outside.

Such a stowage is certainly bad. The officers had common knowledge, which they admit, of all the elements of the bad stowage. They knew that the carbonated waters must not be exposed to rapid changes of temperature. They knew that very cold winter air, between 40° and 50° in temperature, would come in on the mineral water when the wind came down the vent. They knew that when the air was quiet over the decks, as in a following breeze, the hot air from the normal internal heating of the ship would come up through the wide spaces between the few planks in the hatch flooring and heat up the waters. They knew, therefore, that waters would be subject to sudden changes of temperature, even if they were in excusable ignorance of the dangers inherent in bone flour.

If the stowage had been proper, no hot air at all would have come up into the No. 1 between decks, and hence, even during the time when this compartment had to remain entirely closed (because in the fore part of the vessel), no harm would have arisen. It therefore follows that the ship must pay for the damage to the cargo as for improper stowage of the three perishable commodities where the alternation of hot and

cold air were so likely to explode the mineral waters even in the absence of the fertilizer.

IV.

The shipowner has not maintained its burden of proof that it exercised due diligence to make the vessel fit for the voyage, as required by the Harter Act, it appearing that the fertilizer was stowed in port nine days, and the mineral water eight days, before the vessel sailed and had greatly heated within four days after sailing, and no evidence being offered of any due diligence in inspecting the vessel before sailing or that the heating had not commenced before sailing, which failed to disclose the heating. For all the evidence shows the crew or officers knew of some heating before sailing and did nothing to remedy it.

We have heretofore shown "unseaworthiness" in the structure of the between decks compartment, and "bad stowage" in placing the baskets and ironware in the same small compartment with the explosive waters, where they were piled under the vents in midwinter, with the warm inner air and cold outer air alternatively heating and cooling them. On neither of these issues is the question of burden of proof of much importance, as the facts are undisputed.

In this chapter we will show from the log that there was no inspection of the cargo and holds during any

stages of stowage or after stowage, just before the sailing of the vessel, and further that there is no evidence of any kind of diligence in inspecting either No. 1 hold or the forward between decks during or after loading and cargo in it. The case of *Martin v. The Southwark*, 191 U.S. 1, supra, laying down the rule that even bringing the injury within the express provisions of a bill of lading did not shift the burden of proof where its cause arose prior to sailing, further described the obligation to inspect the vessel before sailing time as follows:

“But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and if, by the failure to adopt such tests and to furnish such proofs, the question of the ship’s efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel and, between him and the shipper, must bear the loss.”

Martin v. The Southwark, 191 U. S. 1 at 15, 16.

Other cases holding that diligence to make seaworthy requires a careful inspection are:

“Not liable for defects not discoverable by the *utmost care and diligence*.” (*The Irriwaddy*, 171 U. S. 187.)

“This case was quoted and followed in the still later case of *The Southwark*, supra, in which it was

reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and *that if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper*, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel."

The Wildcroft, 201 U. S. 378 at 389;

The Tenedos, 137 Fed. 443;

The Phoenicia, 90 Fed. 116, 119;

The T. & F. Lupton, 182 Fed. 144.

It is apparent that the inspection to determine whether the hatches should close over a cargo, made up of felt and animal fertilizer, and rags, should be with the "utmost care and diligence". A reasonable master would certainly think it necessary either to use a thermometer in the holds or at least to go down into the hatch of the between decks and observe from his own sense of heat and cold whether there was a normal temperature. The mate did have a thermometer and did take the temperature of some rags, apparently before loading, but there is not a line of testimony that we have found or can recollect that, after loading or during loading, there was any inspection whatsoever of hold No. 1, or of the between decks compartment over it. On the contrary the log shows a complete absence of any inspection. The mate did use his thermometer, however, after the third day out from Antwerp, when he discovered No. 1 hold to be 50 degrees

warmer than the air going down the vent into it and 17 degrees warmer than the next hold.

The log also shows that No. 1 hold had contained this animal fertilizer, ground bone with fat and meat adhering, *for some ten days before sailing*. If it was heated to the extent found four days after sailing, with all the cool ventilation from the outside pouring through it as the steamer moved through the air and created a current down and out its pipes, can it be said that during the ten days while the vessel was lying at the dock, with no motion to force a ventilation, it had not heated to an extent observable on an inspection with the "utmost care and diligence"? Can it be said that it was not so heated at sailing time, that any merely casual inspection would have discovered it? Was it not warm enough so that mere standing in the between decks near the open hatch would have detected it?

Was this warmth not, in fact, actually discovered before sailing and its cause negligently not inquired into? On this, instead of maintaining its burden of proof, the evidence of the shipping company is absolutely silent. This silence and this failure to inquire into the diligence used in inspecting the vessel during and after loading and before sailing, and as to whether the cargo had then begun to heat, is the more significant when we consider that the shipping company had pleaded due diligence in its answer, and that, in the examining of the master and mates, it was clearly developed that we attached great significance to the discovery of the heating of the cargo so soon after sailing.

It is therefore submitted that the shipping company has not maintained its burden of proof (a) that the cargo had not begun to heat before sailing, or (b) that, if it had begun to heat, they did not know it and negligently failed to remedy the situation, or (c) that, even if it had begun to heat, they had given the vessel an inspection of the "utmost care and diligence" and had failed to discover it.

V.

The ship has not maintained its burden that the damage to the cargo was caused by any inherent vice in the appellees' cargo as distinguished from the cargo of other persons.

The absence of a showing of "due diligence" in inspection of holds and in making the compartment seaworthy as to structure, and in properly stowing the mineral water, etc., clearly precludes the shipping company from availing itself of any of the provisions of section 3 of the Harter Act.

However, it is clear that the act does not cover anything other than the inherent vice of "*the* things carried" for the particular shipper complaining. The use of the article "*the*" makes it apparent that the legislature did not intend that the owner could ask the shipper to stand responsible for the inherent vice of any cargo but his own.

For instance, suppose the shipowner knows that animal bones and adhering fat and meat will rot and

he accepts such a cargo, it is apparent that accepting it with this knowledge will not make him liable to the meat shipper for the effects on his cargo of this inherent vice. But it is obvious that the fact that this is an inherent vice of the shipment of cargo owner "A" does not make it the inherent vice of "the things carried" for cargo owner "B", which receives damages of which the heat from "A's" rotting meat is the *causa causans*.

In bills of lading it is elemental that the exceptions of rust, breakage, leakage, etc., are construed to mean the breakage, leakage, etc., of the cargo of the particular shipper, and that they do not cover damage suffered by him through such happenings to other cargo.

Carver, Section 9;

Thrift v. Youle, 2 C. P. D. 432.

Scrutton's Charter-parties agrees in this and points out that this risk is covered by a familiar clause excepting "injurious effect from other goods".

Scrutton, p. 197 and note U.

VI.

Regardless of burden of proof, it affirmatively appears that the captain was negligent in caring for the cargo in failing (a) to close the between deck hatch at once on December 22; (b) to close it at Las Palmas; (c) in letting the cargo stew for seven weeks in this steaming compartment without doing anything for its relief.

Whatever may have been the culpability of the officers up to the time of the discovery of the heat in the lower

hold, there can be no question of their negligence thereafter. They knew exactly what was happening—of the heat constantly coming up into the compartment and hence, of course, of the rapid alternation of heat and cold to which the fragile bottles would be exposed.

On December 22, the temperature was discovered to be 101° in the forward hold at the foot of the ventilator. The next hold was 83° and the next 82°. Ninety degrees is regarded as the danger point (Woodside, Ap. 54).

Our opponent's expert, Captain Baird, said:

“Q. You say if you reached a temperature of 90° in your hold you would be worried, you would be looking for fire?

A. Yes, sir.

Q. If you got up to 100, you would be still more worried?

A. Yes, sir.

Q. And if you got up to 110, you would be some worried indeed?

A. I would not want to find it.”

Ap. 240-241.

Now what was done when this dangerous condition was indicated—dangerous certainly to the mineral water with its recognized sensitiveness to alternations of temperature? *But two hatch boards were taken off the forward end of the deck hatch above, and two of the boards aft.* The amount of ventilation thus afforded is shown by the ship's exhibit “B”, a photograph of the upper hatch on which is drawn the amount of the opening on taking off the boards.

Ap. 132, 164, Claimant's Exhibit “B”.

The hatches were covered at night and when the weather was not fine (165, 151).

This abortive measure was utterly ineffective—for on the next day after the two planks were removed the temperature was 100° in the lower hold. It did not go below this point for ten days and on the day after their arrival, and while they were lying at Los Palmas, December 29, it reached 110°.

Log, December 30, 1910.

Nothing was done to meet the emergency. The mate says:

“Q. When you discovered that, that it was 25 degrees warmer there—110 and 84 being the difference between the two—what did you do?

A. Kept the ventilators and hatches uncovered *just as usual* and turned to wind as the wind moved.”

Ap. 156.

“Q. Did you shift the cargo in any way to let the air down in there when you discovered there was 25 degrees difference?

A. No, sir, I don't think we shifted any cargo.

Q. Just let it stay there with 25° difference in temperature?

A. We kept the hold ventilated.

Q. You had ventilated them for eight days and it still kept up. Did you take any other precaution?

A. Not that I am aware of. We did not discharge any cargo.

Q. Did you shift any cargo?

A. No, sir.

Q. You cannot account for that at all?

A. No, sir.

Q. It is a very extraordinary thing, is it not?

A. Yes, sir, it is.

Q. Did you ever have it happen before in your experience at sea?

A. No, sir, not that I can call to mind now. It might have been done in coal cargoes, but I have never seen it before in general cargo.

Q. It acted like a coal cargo when it heats?

A. Yes, sir, just the same."

Ap. 156-157.

No excuse shown for this neglect. The weather was fine on December 22, 23, 24, 27 and 28. On any of these days the whole upper hatch could have been taken off, the little cargo on the lower hatch lifted on deck, the lower hatch flooring laid in its place, or part of the canvas awning from the deck laid over the opening and held by such planks as were at hand, and all the heat of the lower hold would have been forced out through its own ventilators. With the dunnage for the floor raising the bottles off the iron deck and the very large amount of ventilation in the small space of the compartment, the temperature would then not have been excessive at any time.

Counsel in his argument and in his brief asserts boldly that the *only evidence* as to the possibility of raising the baskets and other goods stowed in the hatch, consisted of the captain's denial that there was any place to put this small amount of cargo during the time he was laying a canvas or some more boards to cover the hatch. He forgets the photographs put in evidence by himself, showing surplus deck space around the hatch and on the forecastle, to stow all this cargo, the testimony he himself offered of the awnings on the fore-castle and the forward deck (166) which would protect

it from any rain while on deck, and the undisputed record of the log of the fair weather and a rising barometer from the 22nd of December on. *Res ipsa loquitur*. The captain's denial cannot rob the court of its right to make rational inferences from these indisputable facts.

After the arrival at Las Palmas the last chance of disproving negligence in care and custody of the cargo vanished, for, although while lying there in the harbor the temperature climbed from the 104° of the day before to 110°, still nothing was done.

Log, December 28, 29, 30.

Can there be any question that, even if the ship had been seaworthy and diligence shown in inspection, the proximate cause of the damage was the failure either to open up at once, on the first day of the heating, the entire face of the upper hatch, to let out all the hot air possible, or to take out the cargo and tighten the lower hatch floor? Can there be any doubt that a large amount of the damage could have been prevented if the captain had taken out the baskets and ironware at Las Palmas, dried them (if the bottles had already broken) and then closed up the lower hatch and pursued his voyage with a dry between decks space? Can there be any question that some, if not all, of the bottles were broken after the arrival at Los Palmas, when the temperature rose to 110°.

It is elementary that the duty of the ship as custodian of the cargo is much higher than that of the ordinary bailee.

“The master, during the voyage, is undoubtedly bound to take all possible care of the cargo, and ‘he is responsible’ says Mr. Chancellor Kent, ‘for every injury which might have been prevented by human foresight, and prudence, and competent naval skill’. 3 Kent, Comm. p. 213.”

22 Fed Cases, Case No. 13,240.

“Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, *he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence.*”

The Niagara v. Cordes, 21 Howard 7 at 26-27.

There is no evidence in this case that a sufficient number of the bottles had been heated to the explosion point at the time of the discovery of the rotting fertilizer, to have done any harm. If the captain had done his duty and taken off his hatch boards to admit air to the cargo, he could have told us exactly whether any damage had then arisen. There can be no doubt that practically the whole of the damage could have been avoided if the cargo had been cared for at once, dried out, etc., and the between decks separated from the hold. Instead he permitted the baskets and ironware and bottle wrappers to steam and rot and rust for over

seven weeks, fully aware of what must be going on, without making any attempt to remedy the situation.*

In view of these facts, it is submitted that Judge Dooling's decision is clearly supported by the record, even assuming that the burden of proof is on libelant when, as here, the cause of the heating is shown to be directly connected with making the vessel seaworthy and properly stowing the cargo. We have shown in our opening chapter, we think, counsel's error as to the condition of the law on this point, but it is submitted that it is a matter of indifference where the burden lies, when we consider the evidence in the light of common sense.

VII.

The owner's primary obligation under section 1 of the Harter Act, as to the care and custody of the cargo, continues during the entire voyage and it is only when the care of the cargo is a mere incident of management of the ship, qua ship, that it ceases to be controlled by the first section of the Act.

Appellant's counsel urges seriously in his brief that, once the vessel is sent to sea in a seaworthy condition, there can be no negligence in respect to the ship's duty to the cargo if the navigation or management of the vessel be in any way involved.

* The specification of error which claims that there should have been a division of damages having been abandoned in the summary in the brief (pp. 3 and 4) and in the argument, we do not touch on it here.

At the argument he expressed a serious doubt as to the correctness of this position—in fact, he practically receded from it. It is easy to understand this when we consider that the Supreme Court of the United States has twice held squarely contrary to the construction of his brief and that this court has twice laid down the contrary rule, which the District Courts of this Circuit have always followed.

In *Knott v. Botany Worsted Mills*, 179 U. S. 69, the Supreme Court held that it is not sufficient to comply with the provisions of section 1 of the Act, i. e., governing care, custody, loading or stowage of the cargo, merely before sailing, but that the obligation continues all through the voyage. In that case certain wool was properly stowed in a seaworthy compartment and was started on its voyage. While en route certain wet sugar was stowed near it and its drainage injured the wool. This drainage was caused by an alteration of the trim of the vessel. Nevertheless, the court held that the violation of one of the obligations toward the cargo, enumerated in section 1, i. e., the requirement for good stowage of cargo subsequently loaded, although occurring long after the voyage of the injured cargo had started, made the vessel liable; and this although a *causa sine qua non* of the injury, though not the *causa proxima*, was the alteration of the vessel's trim, ordinarily a matter of her management.

“Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading

falls within the 1st section. The ship and her owner must therefore answer for this damage, and the 3rd section is inapplicable.”

Knott v. Botany Worsted Mills, 179 U. S. 69,
at 74.

In *The Germanic*, the vessel had been sent to sea in a seaworthy condition and otherwise complied with conditions precedent of section 3 of the Harter Act. Her voyage was completed and she was discharging her cargo when a cumulation of ice on her structure above her waterline combined with the change in her list due to the removal of part of her cargo, caused her to capsize and the libellant's goods were thereby submerged and injured. The question (as here) was whether the unloading the cargo, thus changing the list and trim of the vessel, was a matter involving the owner's duty to the cargo under section 1 of the act, or the captain's obligation in the management of the ship under section 3. The court held that it was a matter “*primarily*” concerning the owner's duty to the cargo under section 1 of the act, and that he was liable for neglect in its performance.

“If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern

must be determined by the primary nature and object of the acts which cause the loss."

The Germanic, 196 U. S. 589, at 597, 598.

The rule was similarly laid down by this court in *Corsar v. John D. Spreckels*, where it was held that since the failure to sail to the nearer port and the voyage to the more distant one was "primarily" a question of navigation of the vessel for her own safety and that of her crew and cargo, the greater injury to the water soaked cargo, during the longer voyage than in the shorter one, was damage merely "incidental" to the mistake of navigation and not primarily in the care of the cargo. In thus invoking the rule, Judge Ross relies on the *Germanic* decision and *Botany Worsted Mills v. Knott*, and cites the specific pages of the Reporter on which the rule appears.

"The question confronting him was *primarily and essentially one of navigation—how best, in view of the trying circumstances* in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining that question was primarily and essentially one of navigation, does not, in our opinion, admit of the slightest doubt, and being such, neither the ship nor her owner is responsible for any incidental damage sustained by the cargo because of the provision of the third section of the act of Congress above referred to. *The Germanic*, 196 U. S. 597, 598; *Knott v. Botany Mills*, 76 Fed. 584.

Corsar v. J. D. Spreckels, 141 Fed. 260, at 263, 264.

Through some inadvertence counsel's brief, on page 27, quotes a sentence from the very page of Judge Ross'

opinion on which appears the above language. Standing alone this sentence would seem to bear a different construction from what it does when the next paragraph is read. The lines quoted above and Judge Ross' reliance on the two cases indicated seem to us necessary to show fully the rule of law he relied upon in the *Corsar* case.

The same rule, i. e., as to the primary nature of the act, was invoked by this court in *Nam v. The Appalachee*, 202 Fed. 826, where the question was whether the injury to cargo by pumping ballast water through ventilator pipes negligently left open in ventilating the cargo, was due to negligence primarily in the management of the ship, or primarily in the care of the cargo. Judge Ross states the rule as follows:

“Let that be done, and the remainder of the record presents the real question in the case, which is, we repeat, whether the damage done to the merchandise of the appellants is *properly referable to a lack of care in its proper protection and custody by the officers of the ship, or to their fault or error in the management of the vessel.*

* * * * *

“In the *Germanic*, the Supreme Court proceeded to declare the law to be:

“ ‘If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and, if this be true, the question which section is to govern must

be determined by the primary nature and object of the acts which cause the loss'." (Italics ours.)

Nam v. Appalachee, 202 Fed. 822, at 826 and 828.

Judge Dietrich, in holding the *Jean Bart* liable for failure to open the ventilators and hatches whereby the cargo becomes sweated, also invokes the rule laid down by this court in *Corsar v. Spreckels*, *The Germanic* and *Knott v. Botany Worsted Mills*. All the damage there occurred en route, and the

"failure of the officers primarily related to the care of the cargo and only incidentally, if at all, to the navigation or the management of the ship".

The Jean Bart, 197 Fed. 1002.

In all these five cases, the court was concerned with the duty of the carrier directly to the cargo while en route. In all is recognized such a duty and that it is controlled by section one, and not by section three of the Harter Act. In three it was held that the duty was violated and the ship held liable.

In view of these decisions, it is not necessary to attempt to distinguish Judge Roger's decision in *U. S. v. N. Y. etc. SS. Co.*, (C. C. A.) 216 Fed. 61, 71.

Judge Rogers seems new to the consideration of admiralty cases. He certainly is ignorant of the historic ruling decisions on the Harter Act. Without reference to any of the cases above cited, he certainly seems to lay down the rule that once the vessel leaves port in a seaworthy condition, all neglect of the cargo is referable to management of the vessel and is excusable under the third section of the Harter Act. Not only

does Judge Rogers ignore these Supreme Court decisions and those of this court, but he, without mentioning it at all, squarely overrules his own court's decision in

The Persiana, (C. C. A.) 185 Fed. 396.

In that case Judge Lacombe said, at page 397:

“The ship had sufficient pumps in good condition to discharge the oil from the bilges and keep it at so low a level as not to expose the wool to damage. But the master intentionally allowed it to accumulate, because if it were pumped overboard it would be lost, but if he could keep it in the bilges till the ship got to New York, it could be pumped out here ‘for the benefit of the oil people’.

“The claimant contends that the ship is to be exonerated under the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). The question presented is whether the damage to the wool was ‘loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery’ of the cargo, within the first section of the Harter Act, or was ‘damage or loss resulting from faults or errors in navigation or in the management of the vessel’, within the third section of that act.

“The frequency with which pumps are worked during a voyage may fairly be classified as ‘management of the vessel’, but that is not determinative of the question here presented. In *The Germanic*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, the court indicated that the purpose or intent with which some act was done or left undone was an important element to be considered. The court says:

“‘If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel

does not make it the less a fault of the class which the first section removes from the operation of the third. The primary object determines the class to which it belongs.'

"In the case at bar manifestly the oil was allowed to accumulate in the bilges, not for ship's purposes, but because, as Judge Hough aptly expresses it, the master 'chose to carry oil stowed in her bilges'. Such an act, although it happened during the voyage, is not within the provisions of the third section."

Now the failure to raise the cargo stowed on the hatch and place it on deck, and dry it, if wet, and close the hatch and then replace the cargo "although it happened during the voyage, is not within the provisions of the third section". It cannot in the slightest way affect the navigation of the vessel and its "primary purpose", and indeed only purpose, is to care for the cargo and prevent further harm to it. While the removal of the upper hatch boards to get the cargo out and the placing of a canvas or hatch boards under the cargo in the lower hatch may, in a remote sense, be called management of the vessel, it certainly is merely incidental to the primary purpose of caring for the cargo threatened with damage from the sweat and heat from the rotting fertilizer below.

It is therefore respectfully submitted that the appellant has not maintained its burden of proof on any of the issues raised by it and (1) that it has not excused itself from delivering in bad condition the cargo it had received in good condition, nor (2) established that it had furnished a seaworthy vessel, nor (3) that it properly stowed the cargo, nor (4) that it used due

diligence in inspection, nor (5) that it properly cared for, the cargo en route when it was discovered to be threatened with injury.

Dated, San Francisco,
June 24, 1916.

Respectfully submitted,

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Proctors for Appellees.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

vs.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, co-partners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

Filed

AUG 23 1916

EDWARD J. MCCUTCHEN,

IRA A. CAMPBELL,

MCCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellant.***F. D. Monckton,**
Clerk.*Filed this.....day of August, 1916.*

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

VS.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L.
DE FREMERY and HENRI M. SUERMONDT, co-
partners doing business under the firm name of
Jas. de Fremery & Co., THE APOLLINARIS COM-
PANY, LIMITED (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

I.

THE BURDEN OF PROOF RESTS UPON APPELLEES TO SHOW THAT THE DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE CARRYING STEAMER. THE SOUTHWARK DECIDES NOTHING TO THE CONTRARY APPLICABLE IN THIS CASE.

Despite all that appellees have said on the question of the burden of proof, the fact remains that, under the

John A. Bishop:

Q. Did you see the willow-ware?

A. I saw the willow-ware.

Q. In what condition was that?

A. It had a black mildew. The burlap that was wrapped around it was *decayed and rotted*.

Q. What was the condition of the willow-ware itself?

A. The willow-ware in places was also *decayed and rotted*. (Apos. 70.)

Thomas L. Brennan:

Q. Do you remember the shipment of willow-ware that came to your firm on the "Skipton Castle" some three years ago?

A. I do.

Q. Did you see it when it was taken out of the vessel?

A. I did.

Q. What was its condition?

A. It was in very bad condition.

Q. Describe it.

A. Well, the coverings on about half of the shipment of baskets were pretty well *rotted*, and a great many baskets were *rotted* so that you could break the willow-ware by putting your finger into the bundle; a good many of the others were black. I don't remember seeing any of them moldy. On some of the baskets there was a white deposit. (Apos. 73.)

Clearer testimony of damage coming within the exceptions of the bills of lading cannot be conceived, and, unless this court is to set aside the principle of law announced in

Jahn v. The Folmina, 212 U. S. 234; 53 L. Ed. 546, it follows that *the burden of proof is upon the shippers to establish that the goods were damaged by the negli-*

gence of the carrier. The rule which we invoke could not have been more unequivocally stated than by Mr. Justice White in the case cited, when he said:

“Of course, where goods are delivered in a damaged condition plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be prima facie within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier.”

This court enforced the rule in the late case of

The Dolbadarn Castle, 222 Fed. 838.

See also:

The Glenochy, 226 Fed. 971;

The Good Hope, 197 Fed. 149.

The decision in *Martin v. The Southwark*, 191 U. S. 1; 48 L. Ed. 65, cited by appellees, lays down no principle which removes the case at bar from the application of the rule in *The Folmina* and the other cases cited. *The Southwark* does not, as stated by appellees, dispose of *The Folmina* and supporting cases; nor can they be distinguished on the ground that in proving the ships within the phraseology of those cases it was not at the same time shown that the cause arose in making the vessel fit and seaworthy for the voyage. Those cases announce the definite rule that where goods are delivered in a damaged condition, plainly within an exception of the bill of lading exempting from that character of loss, the burden is upon the shipper to establish that the goods were removed from its operation because of

negligence of the carrier. The rule stands upon its own foundation and is applicable without exception where the damage plainly falls within the terms of the exceptions of the bills of lading.

In *The Southwark*, the court distinctly found, and upon it grounded its decision, that the cause of the damage was the *unseaworthiness* of the vessel (not a cause validly excepted in the bill of lading); and, having so found, simply held that the owner of the vessel had not sustained the burden of proving that he had exercised due diligence to provide a seaworthy vessel at the time he received the cargo and started upon the voyage. It is true that after having found that the damage was caused by the unseaworthiness of the vessel existing at the inception of the voyage, the court remarked, as cited by appellant:

“It is argued that appellees are not claiming the benefit of the Harter Act, but rely upon the contract in the bill of lading to exempt them from liability in the affirmative proof of negligence.

To permit the stipulations of this bill of lading to cut down the statutory requirements of Sec. 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute. As was said by Mr. Justice White, of somewhat similar provisions in the contract before the court in *The Kensington*, 183 U. S. 263; 46 L. Ed. 190; 22 Sup. Ct. Rep. 102: ‘It is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or its servants.’ ”

This court will note that the Supreme Court did not, after having stated that which has just been quoted, continue in context as quoted in appellees' brief, but that which follows the foregoing quotation in appellees' brief (as though it so appeared in the decision of the Supreme Court) in fact appears in an earlier part of the opinion of the Supreme Court, so that the context in the opinion differs from that as printed by appellees. Nothing that the Supreme Court has said in that case in any way disposes of the rule subsequently laid down in *The Folmina*, for the damages in *The Southwark* were not shown to have come clearly within exceptions similar to those which gave rise to *The Folmina* decision, whereas, in the case at bar the damages are clearly within the operation of similar exceptions.

It is said by appellees (Brief, p. 3) that in *Martin v. The Southwark*, 191 U. S. 1,

“The Supreme Court has squarely laid down that where the cause of injury excepted in the bill of lading concerns the matters controlled by Section 2 of the Harter Act, i. e., loading and stowage of the vessel and her preparation for sea, the fact that the injury falls within the exceptions of the bill does not shift the burden of proof, but that at all times the burden remains on the vessel to show seaworthiness and diligence in stowage.”

As we read it, *the decision does not hold as appellees contend*, and does not affect that great line of decisions, both prior and subsequent to *The Folmina*, which sustain the rule laid down in that case. And that this court has not understood that in cases where the cause of injury excepted in the bill of lading concerns the matters

controlled by Section 2 of the Harter Act, i. e., loading and stowage of the vessel, the burden of proof is shifted upon the shipowner, is demonstrated by what the court said in

The Dolbadarn Castle, 222 Fed. 838, 840.

In that case, the damage was by sweat which the bill of lading excepted. It was contended that the sweat was occasioned by improper stowage, manifestly concerning a matter controlled by Section 2 of the Harter Act. This court, however, after referring to *The Folmina* case, and remarking that in that case the Supreme Court had cited the decision of this court in *The Henry B. Hyde*, 90 Fed. 114, wherein the burden of proof rule was followed, said:

“That rule, sustained by abundant authority, was the rule which the court below applied in holding that *the burden of proof that the damage from sweat was occasioned by improper stowage was upon the libelant*. See *The Koranna* (D. C.) 214 Fed. 172; *The Konigin Luise*, 185 Fed. 478, 107 C. C. A. 578; *The Good Hope*, 197 Fed. 149, 116 C. C. A. 573; *The Patria*, 132 Fed. 971, 68 C. C. A. 397; *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573; *The Baralong*, 172 Fed. 220, 97 C. C. A. 24.” (Italics ours.)

Notwithstanding that the matter therein concerned stowage, both the District Court and this court dismissed the libel *because libelants had not sustained the burden of showing improper stowage*.

Similarly, in *The Koranna*, 214 Fed. 172, the damage was by breakage, which was excepted by the bill of lading, and appellants claimed that the injury to the

casks was caused by negligent stowage, manifestly concerning matters controlled by Section 2 of the Harter Act. And yet the court held:

“It is my conclusion that the libelants have not established their case by a fair preponderance of the evidence. It is well settled, I think, that, whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The *Lennox* (D. C.) 90 Fed. 308; *The Konigin Luise*, 185 Fed. 478, 107 C. C. A. 578. *As this case is one where concededly the loss was from an excepted peril, the material question is: Was the custody, stowage, or care of the cargo, improper and fraught with misconduct amounting to negligence?* If the pipes of cocoanut oil in question were stowed at the beginning of the voyage in accordance with an established usage in transportation for a long voyage, then, giving effect to the printed bill of lading in evidence herein, providing that the carrier shall not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing, the libelants are without remedy and cannot recover.” (Italics ours.)

So it was in *The Baralong*, 172 Fed. 220, wherein the Circuit Court of Appeals for the Second Circuit said:

“Under both bills of lading we think that, in view of the exception of damage from heat, *the burden rested upon the libelant to show that the carrier was negligent in stowing or ventilating the cargo, or otherwise.* This he failed to establish.” (Italics ours.)

The decree was reversed and the cause remanded to be dismissed for failure to sustain the burden cast upon libelant by the exceptions.

See also to the same effect:

The Oceana, 171 Fed. 172, and

The Sao Paulo, 207 Fed. 51.

Furthermore, that the Supreme Court, in that portion of its opinion in *The Southwark*, quoted and italicized on pages 4 and 5 of appellees' brief, was referring to the burden of proof under the Harter Act, is made clear by that portion of the opinion omitted from the excerpt, as shown by the asterisks, quoted on page 4 of appellees' brief. That is to say, after having remarked as quoted in the brief immediately preceding the asterisks, the Supreme Court, Mr. Justice Day writing the opinion, said:

"This case (referring to the decision of the lower court) was decided before the opinion was delivered in the case of *International Nav. Co. v. Farr & B. Mfg. Co.*, 181 U.S. 218, 45 Law Ed. 830, 21 Sup. Ct. Rep. 591, and upon this point is in direct opposition thereto, and fails to give proper weight to the provisions of the act making it incumbent upon the carrier to use due diligence to provide a seaworthy vessel."

Manifestly, what the court was discussing was the burden of proof under the Harter Act, and not the burden of proof rule applicable to a case where the damages are shown to have been clearly within a specific exception in the bill of lading, such as breakage, heat, etc.

Likewise, the burden of proof to which the court referred in that portion of the opinion italicized on page 4 of appellees' brief, was the burden of proof under the Harter Act, and *not the rule which we are invoking under specific bill of lading exceptions*. This clearly appears from the Supreme Court's second reference, in its opinion immediately following the excerpt quoted by appellees, to *The International Navigation Company* case, which was considering alone the diligence required by the Harter Act.

The burden of proof rule which we invoke thus stands unshaken by anything said in *The Southwark*. It follows, therefore, having once shown, as appellant has done, that the damage to the merchandise here in question was of a character which plainly came within the exceptions of the bills of lading, the burden of proving negligence as the cause of the damage was shifted to appellees. This burden they have not sustained, and seek to avoid by a strained construction which they would have this court place upon the decision in *The Southwark*. They have not shown, and they cannot show, the inapplication of the rule in *The Folmina* to the case at bar. It was in failing to observe this rule that the District Court erred.

It is true, of course, that if the damage to the cargo was caused by the negligence of appellant in the loading, stowing, care or delivery of the cargo, appellant is liable therefor, even though such damage was shown to have been within the bill of lading exceptions. *But the fact that appellant may be liable under those conditions does*

not relieve appellees of the burden of proving the negligence, and does not shift to appellant the burden of proving that the damage was not occasioned by negligence.

The pertinent question, then, is: Does the evidence show the damage to have been caused by the unseaworthiness of the "Skipton Castle", or by the negligence of appellant? It does not.

II.

THE SKIPTON CASTLE WAS SEAWORTHY.

Appellees have not shown that the "Skipton Castle" was unseaworthy.

It is contended, however, that she was unseaworthy (A) because of the stowage of the bone meal in the lower hold in an inherent condition which caused it to heat, and (B) because of the fact that some of the hatch covers to the 'tween deck hatch were not laid.

(A) The contention that the vessel was unseaworthy because of the stowage of bone meal in an inherent condition which afterwards caused it to heat, in effect, *would make seaworthiness dependent upon the chance of the ship arriving at destination without her cargo heating.* Appellees, however, do not go so far as to say that the stowage of the bone meal *per se* would render a vessel unseaworthy because it possessed chemical properties which would, under certain conditions, bring about a heating, for if that were so, then every vessel

which carried the product, as, for instance, the Pacific Mail steamers on all of the voyages on which they transported it, would be unseaworthy. In other words, the contention in this regard is that the unseaworthiness arose from the condition of the bone meal, not from the structural condition of the ship or its equipment, yet every case cited by appellees, or of which we have knowledge, points to the fact that *seaworthiness has solely to do with the condition of the ship and its equipment as a vehicle of the sea, so to speak, by which cargo is to be carried*. This clearly appears from what was said by the Circuit Court of Appeals in

The Thames, 61 Fed. 1014,

a decision which was not only cited in *The Southwark*, supra, but was approvingly referred to by the King's Bench Division in

Rowson v. Atlantic Transp. Co., (1903) 1 K. B. 114.

The S. S. "Thames" was held unseaworthy, not because kerosene was stowed in juxtaposition with flour, but because of want of ventilation, as well as leaky decks. The unseaworthiness was a matter which flowed from the condition of the vessel itself, not from the nature or condition of the cargo.

It is thus apparent that the fallacy of appellees' contention in this regard lies in their failure to differentiate between a condition of hull machinery and equipment, and an unknown, but, perhaps, dangerous condition of cargo, innocently taken into the vessel. The former may be unseaworthiness, if the vessel is unfit to carry

her cargo, and the latter improper stowage, if the cargo's condition could be ascertained by due diligence, *but the latter certainly does not constitute unseaworthiness.*

By such a test the shipowner would be obligated not only to furnish a vessel that was in every respect staunch and fit in hull, machinery and equipment to carry safely the cargo with which she was loaded, *but to guarantee absolutely the sound condition of all cargo transported.*

If appellees' contention was sound, then, however great the care exercised to guard against stowing cargo which might turn out to be injurious to other cargo, the vessel would be unseaworthy, and, though the specific damage was covered by an exception in the bill of lading, just as in the case at bar, the shipowner would be absolutely liable, unless the bill of lading contracted against the warranty of seaworthiness. *To follow such an argument to its conclusion, would mean that seaworthiness of the vessel would not depend upon the care exercised by the owner in building and equipping and fitting his ship, but upon the chance that one species of cargo might not damage another on the voyage.* An owner might send, upon her maiden voyage, a vessel that was the last word in naval architecture, an "Imperator" or a "Brittanic", and yet, if because of an inherent defect in one kind of cargo, commercially and safely carried in all classes of vessels, it developed heat and thereby injured other cargo, the owner would be held liable, on this theory, not for improper stowage, but unseaworthiness.

Such, we submit, is not the law, and no case can be cited to it.

(B) Appellees fall into similar error, however, in their further contention of unseaworthiness that No. 1 'tween deck compartment was not seaworthy for the carriage of the mineral water, baskets and enamel-ware, stowed therein, because the 'tween deck hatches to the lower hold were not sufficiently tight to prevent the air of the lower hold, warmed by the heating bone meal, from reaching the 'tween deck compartment. It will be noted that the unseaworthiness is alleged to have consisted in the failure to completely cover the hatch so as to have prevented the hot air, produced by the heating cargo, from reaching the other cargo; not that the vessel would have been unseaworthy, even if the cargo had not heated and the merchandise had arrived undamaged. Thus, *the test which appellees would apply would require a vessel not only so staunch and fit as to safely transport her cargo under all conditions to be reasonably anticipated, but so constructed, equipped and arranged that if, perchance, part of the cargo was unsound it would not damage other cargo.* They would impose upon the shipowner the absolute guarantee that unsound cargo, innocently taken into the ship, would not damage sound cargo. *The now suggested test only differs from that first advanced in that the guaranty in the latter instance was against unsound cargo being loaded, while now it is that unsound cargo shall have been so separated from sound cargo as not to damage the latter, although the unsoundness was unknown despite the exercise of due diligence, and but for the unsoundness the separa-*

tion would not have been required. Both proposed tests have to do with unsound cargo, and require the shipowner to treat that which is normally sound and harmless as unsound and dangerous.

Seaworthiness of a carrying vessel, however, is not dependent upon a sound or unsound condition of cargo, *but upon fitness of hull, machinery and equipment to safely transport sound cargo*, for the presumption must be that, unless otherwise disclosed, the cargo to be carried is in sound condition as a commercial article. The same reasoning, therefore, which leads to the conclusion that a vessel cannot be deemed unseaworthy because cargo was innocently loaded in so unsound a condition as to damage other cargo, makes it obvious that a ship cannot be deemed unseaworthy because unsound cargo, the condition of which was not discoverable by the exercise of due diligence, was not separated from other cargo so as to prevent damage resulting to the latter.

If the test of seaworthiness which appellees would apply should be given its full application, it would require a shipowner to anticipate a possible latent vice in all cargoes, and require him to have his ship so constructed, arranged and equipped that such unsound cargo could not, by any possibility, damage sound cargo. In other words, seaworthiness would require such staunchness and fitness of hull, machinery and equipment as not only to safely carry a cargo in its natural, sound condition, but so as to assure that no damage would come to other cargo if, perchance, without negligence on the part of the shipowner, or his employees, but

after the exercise of every diligence, cargo was taken aboard in a latent unsound condition. Such, however, is not the test of seaworthiness, for it would require the anticipation and prevention by the shipowner of an extraordinary, unusual and unexpected defect of cargo, not discoverable by the exercise of every diligence.

It is true that the warranty of seaworthiness is absolute unless contracted against under the provisions of the Harter Act. The test of seaworthiness, however, does not require such staunchness and fitness and arrangement of hull, machinery and equipment as shall assure safe carriage and delivery of cargo under all possible conditions, but only against those perils to the ship and cargo which are to be reasonably anticipated on the voyage. Inasmuch as the bone meal was not a substance likely to heat, the possibility of its heating was not to be anticipated. (Apos. 44-6, 55-60, 81-2, 223-8, 234-5.)

It must be admitted, for there is no evidence to the contrary, that the "Skipton Castle" would have been seaworthy if the bone meal had not heated. The alleged unseaworthiness is now said to have arisen through the fact that some of the hatches (which it pleases appellees to denominate the "bottom of the compartment", although the hatches formed but a small part thereof) were not on so as to have prevented some of the warm air, generated by the heat, from reaching the cargo. Nevertheless, even on this theory of unseaworthiness, it is admitted that she would have been seaworthy with the hatches off, but for the heating of the bone meal.

In other words, the ship was seaworthy until the cargo heated; then it was unseaworthy because the ship's structure (in this instance, hatches) was not so arranged as to prevent the heat from reaching the other cargo. Or, to go a step further, the vessel was unseaworthy because warm air from heating cargo reached and damaged other cargo. Now, if this were true in this instance, it would be true in all cases of heating cargo, or sweating cargo, and any damage to cargo from vice in other cargo, because it could make no difference, in point of principle, that in the present case it happened to be a hatch not entirely covered, for, in being so uncovered, the hatch was in the condition interior hatches usually are on board ship. Indeed, some ships have no laid 'tween decks at all. It can make no difference, then, that the medium by which appellees would have had the heat kept from the other cargo was the hatches; it was the fact that there was no such protecting barrier that, on the heat occurring, rendered the ship unseaworthy, according to the principle now invoked. On this theory, carried to its logical conclusion, the absence of a protecting barrier to other cargo, in case of the heating of a portion of the cargo, so as to have caused damage by heat, renders a vessel unseaworthy. If the cause of the damage was unseaworthiness, then the bill of lading exception against heat would not avail the ship as a defense. So that, if cargo is damaged by heating of other cargo, the exception against damage by heating is not a defense, but the fact that the heat reached the other cargo, and thereby damaged it, would render the

vessel unseaworthy. In other words, the heating which would give operation to the exception clause of the bill of lading against heating would coincidentally destroy it. The contention, of course, reduces itself to an absurdity in face of the fact that the courts have recognized the validity of the exemption against heat. Once it is admitted that, if the bone meal had not heated, the "Skipton Castle" was seaworthy with the 'tween deck hatches as they were (and there is not a vestige of evidence that she would then have been considered unseaworthy), then it follows that she could only be considered unseaworthy because the hatches were not there to prevent the heat from reaching other cargo. If she were thus unseaworthy, every ship, the cargo of which heated or sweated and damaged other cargo, would be unseaworthy because such heating or sweating had not been foreseen, although it may have been the wholly unexpected, and each kind of cargo so separated from every other that by no possibility could contaminating damage arise. Such a contention, of course, when followed to its logical conclusion, reduces itself, as we have said, to an absurdity.

If, as Bunker, the agent of the Pacific Mail Steamship Company, testified, bone meal is not known to heat in transportation and was carried in the steamers of that company by thousands of bags stowed with other cargo (coffee, tea, rice, matting, soy, saki and miso (Apos. 56-60)), certainly as subject to injury by heat as willow-ware and mineral water, without damaging such cargo with which it was stowed in juxtaposition, and was accounted good stowage, and the vessels were

not thereby rendered "unseaworthy," then it follows that if the bone meal and the mineral water and baskets had been stowed in the same compartment, whether lower hold or 'tween decks, it would have been good stowage, and the "Skipton Castle" would not have been rendered unseaworthy. This being true, then she was certainly not unseaworthy because all of the 'tween deck hatches were not laid in place, and the lower hold completely separated from the 'tween deck compartment. And, if she was not unseaworthy if the bone meal had not heated, she was not, because the hatches were not on, rendered unseaworthy by the bone meal heating. It is not a question of unseaworthiness at all, but solely of stowage. If the testimony of those who testified that bone meal was not likely to heat is to be given credence, then certainly there was no improper stowage.

Appellees' statement is inaccurate in its suggestion that No. 1 hold and the forward (No. 1) 'tween deck are intended for different kinds of cargo, each with a complete ventilator system, intentionally distinct from the other. While different kinds of cargo may, on occasion, be stowed on the same voyage in the two compartments, the latter are neither designed nor intended to be so used, for the same kinds of cargo may be, and certainly are, stowed in both. Nor are the ventilating systems intentionally distinct, save in the fact that the air from the lower hold passes naturally by upward draught through the ventilators from the 'tween deck to the upper deck, for the air from the 'tween deck and lower hold mixes in the same ventilating tube above the 'tween deck compartment, and does not pass in and out as a

separate current of air. In other words, the ventilating pipes from the hold telescoped into those from the 'tween decks, the lower tube being several inches smaller in diameter than the one above, and are not solid pipes through the upper deck, as proctor's statement leaves the impression. (Halliday, Apos. 81-8.)

The evidence does not support appellees' contention of unseaworthiness, for it is clear from all the testimony from which appellees have adroitly taken the portions quoted in their brief, that the witnesses did not intend to condemn, nor did they condemn, the "Skipton Castle," or any other cargo steamer, as unseaworthy for the carriage of mineral water, baskets and enamelware in No. 1 'tween deck, because the covers on the 'tween deck hatch leading to the lower hold were not tight. Deduction of unseaworthiness on that score is of appellees' own making.

It is plain from Captain Keame's testimony, in the portion from which appellees quote, that he was explaining that the ventilators described by him were designed and arranged to give the holds, both lower and 'tween deck, freest ventilation to the outside. Manifestly that is the purpose of any ventilating system. But even if the single excerpt from Captain Keame's testimony, which appellees have italicized (Brief pp. 10-11), be given its worst possible interpretation, it does not justify the conclusion that because the "Skipton Castle's" 'tween deck hatches were not tight, the vessel was to be deemed unseaworthy for the carriage of her cargo.

Nor is there anything to the contrary in Captain Halliday's testimony. In the portion which appellees quote, they subtly put in the mouth of the witness, words, which standing by themselves, would seem to convey the impression that the lower hold was necessarily warmer than the 'tween deck space. Had appellees, however, inserted in their brief (Brief p. 11), the portions omitted from pages 84 and 85 of the Apostles (Halliday, Apos. p. 84), they would have made apparent to the court that the meaning which appellees seek to convey was not intended by the witness, for the latter distinctly stated that *there was no material difference between the temperature of the lower hold and the 'tween deck*. Clearly what the witness was endeavoring to explain, was that the ventilator pipes gave free ventilation to both lower hold and 'tween deck; not that the lower hold was of higher temperature, as appellees would have us infer.

Similarly with the last excerpt which appellees take from the testimony of Captain Halliday. (Brief p. 12.) *Had they but quoted what immediately preceded (Apos. p. 89), it would have been clear that the fact of only sufficient hatches being on to make possible the stowage of cargo over the hatch, did not render the ship unseaworthy for the witness testified that 'tween deck hatches are not battened down, but put on simply to hold the cargo.* (Apos. pp. 38, 41, 86, 89.)

Q. But your hatches are put on there to keep them apart?

A. Yes, they have hatches on, but *they are never battened down*.

Q. They are not battened down, but they are on there so as to prevent the circulation of air between the two spaces?

A. *They are on there to stow cargo on top of, not to circulate the ventilation at all. The hatch is to stow the cargo on top of.* (Apos. 86.)

If unseaworthiness existed because the passage of air through the hatch, from the lower hold to the 'tween decks was possible, then, unless the hatches *were battened down*, such unseaworthiness would always be present, for, if not air tight, there would necessarily be more or less draught of air through them. The fact that Captain Halliday did not ventilate through the 'tween deck hatches, but depended solely upon the ventilator pipes, afforded no evidence that hatches laid as the "Skipton Castle's" were unseaworthy.

Appellees also state (Brief pp. 8, 12) as a fact that the mate admitted that warm air arising from the hold below would ventilate through the few boards that were put on. If appellees meant by that that part of the hot air produced in the lower hold by the heating of the bone meal, doubtless they were correct, for unless the hatches were battened down air tight, some of the warm air would certainly reach the 'tween deck compartment. If, however, appellees intended to leave the impression that the lower hold is normally warmer than the 'tween deck, so as to require the hatches to be battened down, their assertion is again without evidentiary support. If appellees' statement related solely to the fact of the passage of warm air from the heating bone meal, then it is entirely beside the question, for that assumes the necessity of arranging a ship and her

cargo against unusual and unforeseen conditions not likely to arise. Such is not the requirement of seaworthiness, for *if a ship may be held seaworthy even if she fails to ride out safely weather so extraordinarily severe as not to be reasonably anticipated, she cannot be held unseaworthy for not anticipating that a cargo of bone meal, a product not likely to heat, will heat because of an unsound condition.* No testimony of the mate, therefore, tends to prove unseaworthiness.

To the same end, we may ask wherein is there any evidence to support the conclusion of appellees:

“Of course to make this separate ventilation effective, the hatch between the ’tween decks compartment must be closed”? (Brief p. 12.)

The record contains none, but, on the contrary, it clearly appears that it is not customary to lay in place all of the ’tween deck hatches. *The whole object of ventilation is the securing of a free circulation of air, and that it is prevented by ’tween deck hatches not being tightly laid down is not shown or suggested by any evidence.*

If appellees were so strongly of the opinion that the “Skipton Castle” was unseaworthy because her ’tween deck hatches were not laid tight, why did they not adduce some evidence of that fact from the many experienced witnesses who testified by an interrogation addressed to the point, so that the court might have had the assistance of their practical views? Or, better still, why was not some expert on the care of cargoes and ship construction and management, so available in the port of San Francisco, called, and the court given the

advantage of his knowledge of the requirements of seaworthiness, rather than leaving the matter to the forced inference of appellees? The failure to produce any evidence upon the question by their own efforts, or to frankly ask the opinion of the expert witnesses who testified, cannot be attributed by appellees to want of knowledge as to the condition of ship or cargo, for it was fully known to them nearly three years prior to the trial.

The conclusion of appellees rests alone upon their assertions. If this conclusion were sound, then every ship on which the under deck hatches were not tightly laid would be unseaworthy. Were this true, some evidence of that fact would have been easily obtainable, and appellees would not have been forced to the necessity of advancing their own opinion as though it were evidentiary.

In contradiction to the assertion of appellees, it appears from the testimony of Captain Woodside, an old shipmaster and experienced stevedore, *that it is not customary to fasten down the 'tween deck hatches so that they are air tight*. On the contrary, he has seen vessels "lots of times" come into port with the 'tween deck hatches laid so as to leave an open space between the hatches to give a free ventilation of air. (Apos. p. 47.) Captain Halliday similarly stated that *he never battened down his 'tween deck hatches, and never saw them battened down in a ship; that the hatches were put on simply to hold cargo, so that cargo might be stowed on top of them*. (Apos. 89, 90.) *This*

was not controverted by any evidence offered by appellees.

Neither was there any evidence to support appellees' statement (Brief p. 12) that "all the lower holds are affected by the vessel's boilers and furnaces, etc." It may be that the temperature of those holds adjacent to the boilers, and those abaft the boilers, would be somewhat increased, though the opinions of the various masters differed, but certainly none of them testified that *all* the lower holds were affected by the boilers and furnaces. And particularly was this true as to No. 1 lower hold, with which we are alone concerned, for, manifestly, heat from the boilers could not pass forward against the air pressure caused by the ship's headway. This was clearly pointed out by the master and mate. (Apos. 134-5, 171-2, 199.) The boilers and furnaces cannot be rightly advanced, then, even as inferentially suggesting that the No. 1 'tween deck hatches should have been tightly closed so as to shut off a supposed heat from the lower hold. (See Baird Apos. 238-9, 240-1; Halliday Apos. 85-6.)

The fact is that the evidence shows the "Skipton Castle" to have been a modern cargo carrying vessel, complete in every detail of her equipment. Unfortunately, but without any fault on her part, a portion of her cargo heated from an unknown cause, and the heating thus occurring damaged cargo stowed on the deck above. Nevertheless, the damage to the 'tween deck cargo is not to be attributed to a so-called "failure to complete the ship's structure" by laying the 'tween deck hatches tight, for there is no evidence that the

ship's structure, or arrangement of her under deck hatches, were in any different condition than as customary in cargo carrying vessels, or as required to safely carry sound cargo. *If not, then the ship was seaworthy, unless seaworthiness is to be measured by a test which requires the shipowner to make certain that cargo unsound by an undiscoverable defect will not damage sound cargo.* The efficient cause of the damage was the heating of the bone meal, for there is neither evidence nor suggestion by any one possessed of knowledge that the 'tween deck cargo would have damaged but for such heating.

Whether some of the air of the lower hold, heated by the bone meal, gained access to the 'tween deck compartment by passing through the space left between the 'tween deck hatches and amongst the cargo stowed thereon, or whether the increase of temperature in the 'tween deck compartment was caused by the heating of the steel 'tween deck, ventilators and structure of the ship, is not shown by the evidence. But whether one or all contributed to the heating, *it remains a settled fact that the "Skipton Castle" was staunch and fit in every detail for the carriage of all of her cargo had it been in sound condition.* And that certainly was the test of her seaworthiness.

Once it is granted that there is no evidence to show that the cargo would still have arrived damaged by heating, even though the bone meal had not heated, and there is a complete failure of such evidence, then it follows that the ship was not unseaworthy for the carriage of her cargo in sound condition, *unless sea-*

worthiness required that she be so fitted and arranged that an undiscoverable defect in one specie of cargo, if it existed, could not result in damage to other cargo. To hold the ship liable for damage to sound cargo by an undiscoverable defect in other cargo is, in point of principle, no different than holding her responsible for the damage to cargo by its own inherent defect, for the one no more than the other does not result from a wrong chargeable to the owner. Yet the Harter Act (section 3) expressly excepts him from such latter liability, for it provides:

“that if the owner of any vessel * * * shall exercise due diligence to make the said vessel in all respects seaworthy * * *, neither the vessel, her owner or owners, * * * shall become or be held responsible for damage or loss resulting from * * * *the inherent defect, quality or vice of the thing carried;*” etc.

If the existence of a defect in cargo, and the fact that a hatch cover, customarily not laid, was not on, and other cargo was thereby damaged by the unsound cargo, made the carrying ship unseaworthy, then the terms of the Harter Act would be self-contradictory under its settled construction, for it does not, apart from a special contract, exempt the owner from liability for unseaworthiness. The very fact, however, that the Act exempts the shipowner from liability for damage resulting from inherent defect of cargo, providing he has exercised due diligence to make his ship seaworthy, clearly indicates that under the Act seaworthiness of vessel is independent of condition of cargo. *Seaworthiness, then, is not to be tested by a requirement which*

would guarantee that sound cargo would not be damaged by an undiscoverable defect in other cargo. The test must be as to whether or not the vessel is, in every way, fit to carry the cargo as it is known to be in its sound condition as a commercial product.

We believe we are safe in saying that no case can be found in which the test of seaworthiness, which appellees would prescribe, has been applied. On the other hand, a ship may be seaworthy although she is not of sufficient staunchness to weather an extraordinarily severe gale of wind without damaging her cargo.

The Hyades, 124 Fed. 58.

Why? Because seaworthiness only requires a staunchness and fitness *to meet the anticipated, not the unexpected.* And if this be true as to the seaworthiness of a vessel with respect to the seas she may encounter, why is it not, in point of principle, equally true with respect to her cargo? If the damage in question had resulted from a condition of cargo which might have been reasonably expected to develop, then it should have been safeguarded against, or, better still, the cargo should never have been taken aboard. But when it was caused by the heating of cargo which all the evidence shows is not known to heat, and, therefore, a heating not to be reasonably anticipated, then to hold the ship-owner responsible for the damage would be to apply a test of seaworthiness far more drastic than that universally accepted.

The cases cited by appellees do not sustain their contention in any particular. For instance, in the ex-

cerpts from *The Caledonia*, 157 U.S. 124, italicized in appellees' brief (p. 18), the shipowner's undertaking is described as that "the ship is really fit to undergo the perils of the seas, and other incidental risks *to which she must be exposed* in the course of her voyage". What the court contemplated as being included in the perils and risks to which a ship *must* be exposed is made clear by the court's quotation from Parsons on Insurance, in which seaworthiness is, in effect, defined as such suitable condition of a ship as enables her "to proceed and continue on that voyage, and to encounter all common perils and dangers with safety". It is not that she shall be able to withstand *all* perils arising, but all *common* perils and dangers; no more than should she be required to safely deliver her cargo against *all unexpected and not to be anticipated* defects therein. It is true that the court held that the warranty of seaworthiness is absolute, but *it did not prescribe a test of unseaworthiness which would make the ship proof against unanticipated risks and dangers.*

Neither *The Carib Prince*, *The Silvia*, nor *International Navigation Company v. Farr & Bailey Mfg. Co.* lay down any rule upholding the test of seaworthiness which appellees would apply. While they hold that the obligation of the owner to furnish a seaworthy vessel is absolute, they prescribe no test any more rigid than that by which we admit the seaworthiness of the "Skip-ton Castle" should be determined. For instance, in *The Silvia*, it was said:

"The test of seaworthiness is whether the *vessel* is reasonably fit to carry the cargo which she has undertaken to transport."

The "Skipton Castle" undertook to carry bone meal, a product not known to heat or to damage other cargo. It was thus proper cargo to be stowed in juxtaposition to mineral water, etc. (see Bunker's testimony, Apos. 55-60), and by such test should the "Skipton Castle's" seaworthiness be adjudged. Had the bone meal been in commercially sound condition, the "Skipton Castle" was reasonably fit to carry her cargo. But, unfortunately, the bone meal was in an unsound condition, though that fact was not known to the officers or crew of the ship, or employees of appellant. To hold, then, that the "Skipton Castle" was unseaworthy as appellees contend, would be to test her fitness not by the cargo she had undertaken to transport, but by a cargo of a different character, to wit, one affected with an undiscoverable defect. This was not the test prescribed in *The Silvia*.

We are in thorough accord with everything that is said in *The Thames*, cited by appellees. When due consideration is given to the testimony of Mr. Bunker as to the experience of the Pacific Mail Steamship Company in the carriage of bone meal, and to the evidence adduced from the other witnesses who had personal experience in its transportation, it cannot be said that the "Skipton Castle" was unfit to carry that product, together with mineral water, baskets and enamelware. If bone meal could be safely carried with coffee, tea, matting and rice, etc. (Apos. pp. 56, 60), how can it be argued that the "Skipton Castle" was unseaworthy with the bone meal (if it had been undamaged) stowed in the lower hold, and the bottles (glass), baskets (wood)

and enamelware (iron) stowed in the 'tween decks above, because the 'tween deck hatches were not laid sufficiently tight to prevent the passage of air from the hold to the 'tween deck compartment? When the bone meal and mineral water, baskets and enamelware were received on board the ship, the "Skipton Castle" was certainly fit to carry that merchandise, as customary and well known articles of commerce. And that is all that is prescribed in *The Thames* as the test of seaworthiness. The damage resulted *not from the unfitness of the ship to safely carry the cargo with which she was supposed to be loaded, but from an unsoundness in part of her cargo that was not discoverable by the exercise of every reasonable diligence.* Either the "Skipton Castle" fulfilled every requirement of seaworthiness, or seaworthiness must include an absolute warranty that the ship is so constructed that unsound cargo, innocently taken into the vessel, cannot by any possibility, damage sound cargo. *No case of which we are aware prescribes such a test.* Certainly *The Thames* does not.

So it is with *The Indrapura*. The test is as to fitness to carry each particular article well known to commerce. Bone meal likely to heat is not so known; bone meal unlikely to heat is an article well known to commerce, and was the article which all concerned believed was loaded on board the "Skipton Castle". She is, therefore, to be judged by that article, and not by the fact that it developed heat from an unknown cause.

In none of the remaining cases cited, *The Southwark*, *Tattersal v. Nat. S. S. Co.*, *Rowson v. Atlantic Trans-*

port Co., or American Sugar Ref. Co. v. Rickinson was any different rule promulgated. In none of them, where the ship was held unseaworthy, was the damage to sound cargo caused by another portion of the cargo developing an unsoundness. But the damage resulted from an unfitness, in one particular or another, of the vessel or her equipment to safely carry the sound cargo with which she was loaded.

If the experience of those who have transported bone meal counts for anything, it proves conclusively that it was not a substance known to heat. Except for its heating due to an unsound condition, the entire cargo in the lower hold and in the 'tween decks would have arrived safely, so far as the evidence discloses. The cause of the damage, then, was not an unfitness to carry the cargo with which the "Skipton Castle" was reasonably believed to be loaded, but an undiscoverable defect developing in part of her cargo.

Appellees say that hermetically sealing by tarpaulins of the 'tween deck hatch was not necessary as the fine ventilator system for the hold below would have taken care of the hot air had not the large hatch opening drawn the air by another channel. *There is no evidence to such effect in the record*; and that the hot air was not drawn away from the ventilators is evidenced by the fact that all of the temperatures were taken in the ventilators of the lower hold. (Apos. 188-9.) No witness testified that if the hatch covers had been laid without being battened down, the ventilators would have drawn off the hot air of the heating bone meal. It is true

that the hold was exceptionally well ventilated, but when appellees assert that the ship was unseaworthy because hot air from the heating bone meal would pass into the 'tween deck compartment, such conclusion, if sound, would require that such passage of air be stopped, and that could only have been done by *battening down* with tarpaulins. In the absence of any testimony from any witness that the carriage of bone meal in the lower hold, and mineral water, baskets and enamelware in the 'tween decks, required such separation, with the cargo in sound condition, the contention of appellees must fail. If such battening were necessary, it could have been easily ascertained from the various experienced witnesses by a squarely propounded question. That such battening, however, was not required for the safe carriage of those well known articles of commerce is too clear from the evidence, and especially from Mr. Bunker's and Captain Halliday's testimony, to admit of question.

It is said by appellees (Brief, p. 9) that we stated and reaffirmed that there was no evidence in the record that it was customary to complete the forward between deck compartment by laying the planking of the hatch or otherwise closing it by boards or canvas. What we said upon the trial, and now reiterate, was, that *there is no evidence in the record even tending to show, let alone establishing, that the "Skipton Castle", or any other vessel, was unseaworthy because all of her 'tween deck hatches were not laid in place; and, indeed, the evidence shows to the very contrary, that it is not custo-*

mary to close the hatches, for the testimony of Captain Woodside, an independent witness, engaged in the business of loading and discharging vessels in the port of San Francisco, was that hatches are frequently left open (Apos. p. 47), and the testimony of Captain Halliday clearly establishes that they are put on simply to hold cargo, so that cargo may be stowed on top of them (Apos. 86, 89).

Again, it is stated (Brief, p. 13) that the failure to make the hatch tight, a matter of ship structure, was the *causa causans* of the loss. We say most emphatically that the evidence does not establish the assertion of appellees. The evidence does not show that any quantity of the warm air, created by the heating of the bone meal, passed into the 'tween deck compartment through the 'tween deck hatch and caused the damage in question. So far as the evidence discloses, all of the warm air that may thus have entered the 'tween deck compartment passed upward by natural draft through the open upper deck hatch; and, furthermore, so far as any of the evidence shows, the entire damage may have been, and most likely was, caused by the heating of the steel deck and steel ventilators, on which and around which the mineral water and baskets were stowed. Much is said throughout appellees' brief of the flooding of the 'tween deck compartment by the streams of hot air from below. No one testified to such condition, and there is no evidence to justify such extravagantly reckless assertions.

The fact that appellees thus strain at the evidence in the record points to the importance, in this case, of the question of the burden of proof. With the burden of proof upon appellees, to show that the heating of the bone meal and the breakage, rust and decay of the merchandise was caused by the ship's negligence, such negligence must be established by evidence and not by bald assertions unsupported by any evidence.

It is also suggested that the bursting of the mineral water bottles could not have been caused by the heating of the steel deck and ventilators, because of the deck being dunnaged. Unquestionably the usual dunnage was used to raise the cargo from immediate contact with the deck, as was customary (Apos. 130), so as to protect the cargo from any sweat that might occur, and to admit of a freer circulation of air about the cargo, but that dunnage would not, *and there is no evidence in the record to show that it did*, prevent the steel decks and ventilators from conducting the heat of the lower hold to the 'tween deck compartment. And, further, it is urged that any warmth that might have come through the steel decks would have been taken care of by the four large ventilators. Ultimately so, of course, but not until it had been diffused about the cargo and had heated the mineral water around which the heated air necessarily circulated from the deck in rising to the ventilator openings at the top of the compartment.

Again, it is stated that such warm air as passed through the 'tween deck hatches would not pass upward (as heated air does), through the open hatches of

the upper deck, but that the ventilators, especially constructed for the intake and outflow of air, would bring the hot air of the lower hold over to them, and hence to the explosive mineral waters stowed beneath them. There is no evidence showing such a circulation of the warm air, and, indeed, common knowledge teaches that it would rise to the top of the compartment and pass out of the upper hatch, or, if that was closed at night, as counsel suggests, then it would pass along immediately beneath the upper deck above the cargo to the opening in the 'tween deck ventilators at the top of the compartment.

Furthermore, it is said that it was the alternations of heat and cold that broke the bottles whose waters dampened the air and caused the moulding of the baskets and the rusting of the ironware. There is no evidence that it was the alternations of heat and cold. The breakage of the bottles resulted, as was clearly shown by the representatives of the owners of the mineral waters, from the heating of the bone meal, causing the mineral water in the bottles to throw off the gas with which they were charged, and so increase the pressure as to burst the bottles. Whatever cold air may have reached the bottles only had the effect of driving the gases back into the water, and, thereby, relieving the pressure. This is clearly shown by the evidence of the expert water 'men.

The evidence establishes beyond peradventure that the "Skipton Castle" was seaworthy, and shows the damage to have been breakage, decay, rust, wastage

and damage to wrappers, caused by the heating of the bone meal. Appellees have not sustained the burden of proving a loss by unseaworthiness, or by negligence. But their wildly extravagant statements, unsupported by any evidence, demonstrate the importance to be attached by the court to the burden-of-proof rule.

III.

THERE IS NO EVIDENCE TO SHOW THAT THE DAMAGE TO THE CARGO WAS CAUSED BY NEGLIGENCE EITHER IN ITS STOWAGE OR CARE AND CUSTODY.

(A) Stowage.

It was said by District Judge Hazel in *The Koranna*, *supra*:

“It is my conclusion that the libelants have not established their case by a fair preponderance of the evidence. It is well settled, I think, that whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The *Lennox* (D. C.), 90 Fed. 308; *The Konigin Luise*, 185 Fed. 478; 107 C. C. A. 578. As this case is one where concededly the loss was from an expected (excepted) peril, the material question is: Was the custody, stowage, or care of the cargo improper and fraught with misconduct amounting to negligence? If the pipes of cocoanut oil in question were stowed at the beginning of the voyage in accordance with an established usage in transportation for a long

voyage, then, giving effect to the printed bill of lading in evidence herein, providing that the carrier shall not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing, the libelants are without remedy and cannot recover."

Applying the doctrine of that case and similar cases, appellees cannot recover herein unless they have shown by a fair preponderance of the evidence that the cargo was not stowed at the beginning of the voyage in accordance with an established usage in its transportation for the kind of a voyage on which the "Skipton Castle" was about to proceed. This, admittedly, they have not done, for no one has testified that the stowage was improper. The cargo was stowed under the supervision of Captain Baines, a world-renowned surveyor of cargoes in Antwerp, and, also, under the supervision of the chief officer of the "Skipton Castle," a man who had been going to sea for twenty years and had been a ship's officer in practically all of the world's great trades. Those men, together with every other witness called who was questioned to the point, testified to the proper stowage of the cargo. (Apos. pp. 46, 82, 119-120, 134, 137, 159, 167, 168, 171, 175, 178, 216-217, 240.)

It is contended by appellees that there was improper stowage of the mineral waters in No. 1 'tween decks, because, it is said, the mate's admissions show that for this season of the year it was probably the hottest compartment of the ship. We submit that the testimony of the mate admits of no such interpretation. In an honest endeavor to account for the heating of the bone meal,

he could only explain it through the possibility of the forced shutting off of the ventilation during heavy weather. But the evidence, not only of the mate, but of every other witness called, who was questioned to the point, clearly established that the No. 1 'tween decks was as good as any compartment in the vessel, if not the best, in which to stow the goods. Furthermore, the temperatures recorded were not taken in No. 1 'tween decks, but at the bottom of the ventilator to the lower hold.

Again much is said about alternating hot and cold blasts being taken in through the ventilators, but, in this respect, if there was such a thing, No. 1 'tween deck compartment and No. 1 lower hold experienced less of it than any other place in the ship.

With all of the assertions that the stowage was bad, appellees called no witnesses who testified as to how a better stowage could have been had, or that the stowage was not as customary. And, now, appellees endeavor to avoid the consequences of their failure to sustain the burden cast upon them of showing improper stowage, if the rule in *The Koranna* and other cases is to be adhered to, by an unwarranted construction which they seek to place upon *The Southwark*.

We submit that, if the rule in *The Koranna* is good law, this Court cannot find that appellees have sustained the burden of proof resting upon them of showing improper stowage. On the other hand, the evidence, in fact, clearly establishes proper stowage.

(B) Appellees Have Not Sustained the Burden of Proving That the Damage Was Caused by Negligence in the Care and Custody of the Cargo.

(1) During Loading.

It is said by appellees that the log shows that there was no inspection of the cargo and holds during any stage of the stowage or after stowage, just before the sailing of the vessel, and, further, that there was no evidence of any kind of diligence in inspecting either No. 1 hold or the forward between decks during or after loading and cargo in it. (Brief p. 26.) *Accepting that statement at its face value, it conclusively establishes that appellees have not sustained the burden of showing that there was negligence in the care or custody of the cargo.* To avert it, appellees again advance the contention that the burden of proof is not upon them, quoting from *The Southwark* a portion of the opinion that referred to the burden resting upon the owner of showing a vessel to be seaworthy in a case where the damage was found to have been caused by unseaworthiness. The Supreme Court, as we have previously pointed out, was not, in that case, considering the question of burden of proof in the light of special exceptions in the bill of lading exempting the owner from liability for the particular character of damage suffered, as breakage, heat, decay, etc.

So it is with the other cases cited on pages 26 and 27 of appellees' brief. What the courts in those cases have to say is not in point on the question of the burden of proof under the rule applicable in this case.

In *The Wildcroft* and *The T. & F. Lupton*, the courts were concerned alone with the burden of proof under the Harter Act, and in *The Tenedos* and *The Phoenicia*, the damage was caused by the entrance of sea water through unseaworthy ports. In none of the cases was the burden of proof considered with respect to damage clearly within specific bill of lading exceptions. They do not, therefore, detract from the force of the rule laid down in *The Folmina*, *The Dolbadarn Castle*, *The Koranna*, and similar cases.

It is said by appellees (Brief p. 27) that a reasonable master would certainly think it necessary either to use a thermometer in the holds, or at least to go down into the hatch of the between decks and observe from his own sense of heat and cold whether there was a normal temperature. We ask why, when the evidence clearly shows that bone meal was an article not known to heat in transportation, as the evidence conclusively shows? No one testified that prudent care of the cargo required the master to do as appellees now, *after the event*, suggest that he ought to have done. If a proper care of the cargo required a thermometer test to be made of the holds, in which no cargo likely to heat was being stowed, in the course of the loading, as suggested by appellees, then evidence of that requirement should have been adduced. Without any evidence in the record bearing upon it, appellees cannot sustain the burden of proof resting upon them by mere opinion of counsel.

It is further said that the log shows a complete absence of any inspection. While appellees are mis-

taken in this assertion, *it would only amount*, if it were true, *to a failure on their part to sustain the burden of proof resting upon them.* The fact that the log may have been silent upon the matter of inspection does not, of itself, prove that no inspection was made in port, for logs are not kept with the same degree of care during the process of loading as when the ships are being navigated at sea, as evidenced by the brevity of the present log. The fact that the mate may not have made in his log detailed entries of everything that was done in respect to the cargo during the process of loading, *does not constitute evidence available to appellees to sustain the burden upon them.*

It is interesting to note the extreme to which appellees have gone on page 28 of their brief, in attempting to stretch the evidence. It is said that the log shows number one hold had contained this animal fertilizer, ground bone with fat and meat adhering, for some ten days before sailing. We find nothing in the log which so describes an animal fertilizer. The log, of course, mentions the loading of the bone meal, but all the frills, as to animal fertilizer, ground bone with fat and meat adhering, are of appellees' making. Then, it is said that if it was heated to the extent found four days after sailing, can it be said that during the ten days while the vessel was lying at the dock with no motion to force the ventilation it had not heated to an extent discoverable on inspection with the utmost care and diligence? They further question as to whether it was not so heated at sailing time that any mere casual inspection would have discovered it? Was it not warm

enough so that mere standing in the between decks in the open hatch would have detected it? Our answer is that *so far as the evidence discloses it could not have been, for the record shows that the cargo was stowed under the supervision of the mate and the surveyor Baines, and does not show that either of those men, or any of those actually engaged in loading the ship, detected any heating.* The very fact, however, that appellees propound the questions that they do shows a consciousness that *they have failed* to produce any evidence that the bone meal was heating at the time suggested, or that there was any negligence in the loading or care of the cargo.

The evidence on the contrary shows that there was not the indifference to the cargo which appellees would have the court believe. For instance, first officer Page testified as to the ventilation in port:

Q. Are you sure you did everything you could to ventilate this No. 1 hold?

A. Everything possible.

Q. While you were loading the vessel in Antwerp?

A. Yes, sir. (Apos. p. 146.)

* * * * *

Q. Could you have done anything to get any more ventilation in that space than you did at Antwerp while you were lying there?

A. Say that again.

Q. Could you have done anything more than you did at Antwerp to get ventilation into that space?

A. No, sir. (Apos. p. 152.)

As for not taking temperatures while in port, he explained that the hatches of the vessel were off at all times during fine weather:

Q. You do not take the mean temperatures while in port when you are loading? It is only when you get out to sea that you take the temperatures?

A. Principally at sea. I do not think I took them in port. I am not quite sure. When we are in port, as a rule, all the hatches are off fore and aft, and discharging is going on, or loading. The whole time we are in port the hatches are off if it is fine weather.

Q. That is the reason you did not take the temperatures while you were in Antwerp, was it not?

A. Yes, sir. (Apos. p. 144.)

That the stowage of the cargo was superintended and watched by the mate and the surveyor, Baines, and that the cargo was in good condition clearly appears from the following:

Q. I do not imagine that you handled any of this cargo yourself; stowed any of these packages and put them in yourself, as mate? A. No, sir.

Q. That was done by the stevedores?

A. Yes, sir. We superintended it and watched it.

Q. As a matter of fact, the chief man in that is the local stevedore? He is the chief man who stows the cargo?

A. This Captain Baines, he stowed the cargo. The captain and I were also superintending the stowage of it. (Apos. p. 145.)

* * * * *

Q. Did you see this bone-meal when it was loaded?

A. Yes, sir, I see the bone-meal.

Q. What condition was it in?

A. In apparently good condition.

Q. Was it damp or wet? A. No, sir.

Q. Did you handle any of the sacks yourself?

A. Yes, sir.

Mr. DENMAN. He said he did not in his direct examination.

Mr. CAMPBELL. He did not say that.

Mr. DENMAN. Q. I asked you if you touched any of the cargo yourself.

A. The question you asked me, if I may interrupt, was did I handle the cargo. You meant to say, as I understood it, did I load any of the cargo myself. I went around and looked at all the cargo as it came in the ship, when it was on the quay.

Mr. CAMPBELL. Q. Did you examine it?

A. Yes, sir, *I examined practically all the cargo, everything that was taken in.*

Q. *In what condition did you find this bone-meal that was taken in No. 1 lower hold?*

A. *In apparently good condition.*

Q. *Was it wet?* A. *No, sir.* (Apos. pp. 190-1.)

* * * * *

Q. You felt all the bone-meal bags to see if they were or not?

A. No, sir, but I walked over a portion of them and had my hand on a number of them.

Q. What made you put your hand on them?

A. Just knocking about the wharf, probably leaning on them looking after other things going in, and I was covered with bone-meal, knocking around on the wharf, when it was taken off in the carts and stored in the shed. (Apos. p. 195.)

* * * * *

Q. You depended on your notes when you made that thing up, didn't you?

A. I depended on my notes. On the general outline I have, a very good idea as the thing goes along. I can remember quite a number of things up and down the holds and in the shed, watching things coming down and puttering about the whole day; not only myself, but *the second and third officer is watching the cargo in each hold.*

Q. This was made up in part then from the information that you got from the second and third officers? A. No, sir.

Q. It was not?

A. No, sir. I might ask them a question now and then.

Q. As to where the cargo was stowed, you mean?

A. If they were putting down something in No. 4 hold and I wanted to get down No. 1 to see anything, I would probably sing out to the officer, "Where are they putting down that stuff. Are they putting it on the fore part?" or any other part of the hold that they were putting it in, so that I should know; and when I came up from No. 1 *I would go down No. 4 and look at it.* (Apos. pp. 207-8.)

We respectfully submit that the evidence does not show any negligence in the care and custody of the cargo during loading. On the contrary, the uncontroverted evidence is that it was stowed under the eyes of ship's officers and surveyor Baines and that the cargo was in good condition.

(2) *On the Voyage.*

With the burden of proof upon them to show that the cause of the heating, breakage, rust, decay, etc., was negligence, appellees are not entitled to any relief upon the "supposition" that the damage could have been averted by moving and raising such portion of the cargo as was on the square of the hatch, and by closing the hatch between No. 1 'tween decks and No. 1 hold, "so that the hot air of the latter might rise through the ventilators without reaching the 'tween decks", as assumed by the District Court.

There was no evidence, as we have pointed out in our opening brief (pages 13-25), that such moving and raising could have been done; indeed, *the master states to the contrary, that he could not do anything; that there was no place to take the cargo out.* (Apos. 186.) Appellees say that the photographs of the deck show otherwise, *but no witness so testified.* Now, the courts take judicial notice of some facts, but we are yet to hear of any court taking judicial notice with respect to the navigation and management of a vessel at sea. How then, can this court say that want of care has been established by a fair preponderance of the evidence, as *The Koranna* held was required to sustain a similar burden of proof, when no witness so testified? The court cannot substitute its inference upon a subject, as to which there is no evidence to sustain the inference and as to which it cannot take judicial notice. On what evidence, we ask, can this court place its judicial finger and say that it *proves* that the damage would not have resulted if the cargo on the square of the hatch had been raised and moved and the hatch closed? We submit that there is none, and, being none, certainly the burden of proving the fact has not been sustained by appellees.

By what evidence can this court say that it is established that the damage was not done by the heating of the bone meal being transmitted to the 'tween deck compartment through the steel deck? Absolutely none, for, so far as the evidence discloses, the damage may all have been caused in that manner. This being true, how, then, can it be said that the damage was caused by the hatch not being closed on discovery of the heat-

ing? *It cannot be said, and the impossibility of saying it is an admission that the burden of proof has not been sustained.*

To what evidence in the record can this court point showing that it would have been proper and practical, with all the attending risks of the sea and of inclement weather and storms, to move the cargo from the 'tween decks to the exposed weather deck? There is no evidence of it, and it certainly is not a matter of which this court can take judicial notice. The only evidence before the court is that of the master, to the very contrary. *How, then, can it be said that a fair preponderance of the evidence shows that it was an improper care of the cargo not to have done so, and that, if it had been done, the damage would not have occurred?* It cannot be said!

Without evidence of improper care, this court will not deny to appellant the benefit of the rule which this court gave to the "Dolbadarn Castle"! If it does why the discrimination? If it accords to appellant the benefit of the rule, as it certainly should under the evidence, then *it must find that the burden of proof that the damage was caused by negligence is upon appellees and that it has not been sustained.*

Appellees speak of abortive measures; stamp as neglect that which was done; say that the heating of the 'tween deck compartment could have been prevented by the moving of the cargo and the closing of the hatch. *Who testified to those assertions? Absolutely no one.*

Where is there any evidence that even if the cargo had been removed, the hatch could have been closed? So far as the evidence discloses, the hatches may have been stowed away under other cargo, for, manifestly, there was no prospective need of them on the voyage. *There being no evidence that the 'tween deck hatch could have been closed, how can this court say that the damage could have been prevented by raising and moving the cargo?* And, if the hatches were not available, because perchance they were stowed away beneath other cargo, no negligence in that regard could have been charged, for the hatches would not have been needed in any event if the cargo had not heated.

Appellees suggest the availability of the forecastle deck awnings. *Who testified that they were suitable for the use to which appellees would apply them? Absolutely no one.*

Does a fair preponderance of the evidence within the requirement of the rule laid down in *The Koranna* and *The Dolbadarn Castle* mean that there must be some evidence? It certainly does! If so, where is the evidence when no witnesses, other than the master and chief officer, were called and interrogated to the points which we have been mentioning? There is none. *In these circumstances, either this court must find that the burden of proving negligence has not been sustained by appellees, or the burden of proof rule, so clearly announced by high authority, will be reduced to a mere formula.*

We respectfully submit that this court should enforce the burden of proof rule as every other court has done in similar cases under the evidence adduced, and want of evidence, and should hold that appellees have not shown that the damage was caused by negligence.

IV.

IF IT WAS NEGLIGENCE NOT TO CLOSE THE HATCH, SUCH NEGLIGENCE WAS IN THE MANAGEMENT OF THE VESSEL WITHIN THE PROTECTION OF THE HARTER ACT.

The fact that in course of the argument we were frank enough with the court to say that we were not absolutely certain in our own minds that, if there was negligence in not closing No. 1 'tween deck hatch it was negligence in the management and navigation of the vessel within the protection of the Harter Act, should not be construed by the court as a receding from the contention which we have made in our opening brief. The Supreme Court, in *The Germanic*, pointed to the possibility of such a perplexity. Necessarily, there is much to be said upon both sides of the question, as appellees concede when they admit that the latest decision of the Circuit Court of Appeals for the Second Circuit in

United States v. N. Y. & O. S. S. Co., 216 Fed. 61, upholds our contention.

That decision cannot be distinguished, however, and its effect cannot be detracted from, by the suggestion of counsel that the writer of the opinion, Circuit Judge

Rogers, seems new to the consideration of admiralty cases, and that "he certainly is ignorant of the historic ruling decisions on the Harter Act". Judge Rogers has too long held a position of high eminence, as a lawyer, a scholar in the field of jurisprudence, and a judge, to be successfully stamped as "ignorant" of, or "new" to, the course of admiralty decisions.

Two other circuit judges, Lacombe and Ward, sat in the case and approved of the opinion. Certainly, as to those judges, even counsel would not say that they are "ignorant" of, or "new" to, the historic decisions on the Harter Act, for, unquestionably, as members of the Circuit Court of Appeals for the Second Circuit, they have reviewed in the same length of time, more admiralty decisions than any other court in the United States. At least one of them, Circuit Judge Ward, was a distinguished admiralty lawyer at the bar before he ascended the bench. The other, Circuit Judge Lacombe, was the author of the opinion "on the Harter Act" in *The Persiana*, 185 Fed. 396, relied upon by appellees. The decision, then, must be distinguished, if at all, upon grounds other than personal to the judge writing the opinion.

But, whatever counsel may have said as to the knowledge of Circuit Judge Rogers, they are silent as to the qualifications of District Judge Brown, of the Southern District of New York, than whom no district judge has tried more admiralty cases. Counsel make no attempt to distinguish the decisions of Judge Brown, cited in our opening brief, and yet the decision in *U. S. v. N. Y.*

d. O. S. S. Co., supra, is grounded upon his earlier decision in

The Guadeloupe, 92 Fed. 670.

In that case, hatches were not opened in a port of distress, which, if they had been opened and the cargo removed, would have disclosed the damage to the cargo. The court held the failure to open them and to remove the cargo negligence in management. As we read the decision, it is indistinguishable from the one at bar, once it is found that those on board the "Skipton Castle" were negligent in not removing the cargo and closing the hatch.

In a still more pointed case, that of

The British King, 89 Fed. 872; aff. 92 Fed. 1018, Judge Brown held it to be negligence in management of the vessel within the exemption of the Harter Act, where soundings were not taken and the pumps not applied, with the result that water leaking from a ballast tank was thereby permitted to accumulate in the cargo compartment and damage the cargo. We cannot distinguish the facts of that case, in their essential elements, from those now before the court. On the theory by which negligence is here claimed, heat from the lower hold passed through the hatch and reached the 'tween deck cargo; there, water from a ballast tank passed through a leak and reached the cargo. Here, it is said that a closing of the hatch would have prevented the heat from reaching the cargo; there it was found that a sounding and the working of the pumps would have prevented the water from reaching the cargo. The failure

complained of in both cases was that of not utilizing the means at hand, in one case pumps—in the other, hatches, to prevent the harmful agencies from reaching and injuring the cargoes. In the case cited, Judge Brown, in the District Court, and Circuit Judges Wallace and Lacombe, in the Circuit Court of Appeals, held the failure negligence in management. Why, then, is not the negligence herein complained of equally negligence in management, if it be negligence at all? We cannot distinguish the case, and counsel made no attempt to do so.

For like reasons we are unable to distinguish the decision of Judge Brown in

The Ontario, 106 Fed. 324, (affirmed 115 Fed. 769).

We can see no difference between not putting on the 'tween deck hatches on the "Skipton Castle" to prevent the heat from the lower hold reaching the cargo in the 'tween decks, and the failure to report a leak in a ballast tank and keep the pump going so that no accumulation of water from the ballast tank would rise and damage the cargo. Yet Judge Brown held that the latter failure was negligence in management.

In

The Jean Bart, 197 Fed. 1002,

the negligence was in not using the ventilators and hatches for the very purpose for which they had been installed in the ship, to wit, the preservation of the cargo on the voyage. It is true that the hatches were intended to complete the ship's structure, but it appears that they were used as a part of the ventilating system, just as much as the ventilators proper. As we read the

decision, it was because of the failure of the master to use the equipment intended for the preservation of the cargo that Judge Dietrich held the ship liable. In that case, Judge Dietrich recognized that his views were at variance with certain expressions found in

Rowson v. Atlantic Transport Co., supra,

and

The Hudson, 172 Fed. 1005.

In

The Germanic, 196 U. S. 589,

the negligence was in the unloading of the cargo, and not in the improper use, or failure to use, part of the ship's equipment intended and placed on board primarily for the care of the cargo. This, the Supreme Court pointed out with emphasis when it said:

“That ‘in’ which, as the statute put it, the fault was shown, was not in the management of the vessel, but unloading cargo; and, although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs.”

We cannot read the decision of this court in

Nam v. The Appalachee, 202 Fed. 822,

as decisive of the precise question which is now before the court in this case. Similarly, with

Corsar v. J. D. Spreckels Bros. & Co., 141 Fed. 260.

This court will note that the Supreme Court of the United States in

Martin v. The Southwark, supra,

quoted at length from *Rowson v. Atlantic Transport Co.*, but upon another point than that under present

consideration. We refer to its having been mentioned in that case to emphasize the weight which the Supreme Court evidently considered should be given to the decision of the English Court of Appeals. In the *Rowson* case, with respect to the negligent management of the refrigerating apparatus, Romar, L. J., said:

“In the present case the facts which prevent me from differing from the learned judge in the court below in his conclusion of facts are these. It appears that, as part of the vessel, there were several refrigerating chambers, and there was in particular a pipe, the operation of which when properly worked was to keep the air of the refrigerating chambers sufficiently cool. Now those chambers were not all used for the cargo of butter, for during the particular voyage we are now considering two of them were being used for the ordinary purposes of the ship in this sense, that they were used for the storage of provisions which required refrigerating, those provisions being required for the ordinary purposes of the ship’s crew, or of the passengers, if there were any, during the course of the ship’s voyage as a sea-going carrier. The man who had to attend to this pipe was an engineer of the ship employed in the ordinary way in looking after this pipe regarded as part of the vessel. He had not been specially told, nor was it his special duty, to look after the cargo in particular or any part of the cargo. The pipe he had to attend to was wanted, as I have pointed out, for the general purposes of the ship as well as for the requirements of some of the cargo, but, so far as the engineer attending to it was concerned, all he had to do was to look upon it as it was, namely, as a pipe required for the general purposes of the vessel. He had not to consider it as affecting any *special or particular* part of the cargo; indeed, I may point out that this engineer would have had to attend to this pipe, as it appears from the facts of the case, even if there

has been no cargo requiring refrigerating, for he would have had to keep the pipe at work for the purpose of keeping cool the two chambers which contained the ship's provisions; and the injury to the cargo which was caused by the act of negligence was only indirectly caused by the act. The effect of his act was to prevent the pipe acting properly so as to cool the refrigerating chambers as a whole, and the effect of that upon some of the refrigerating chambers was that the temperature got above the proper temperature necessary for proper preservation, and part of the cargo became injured. But, as I have said, it really was, properly regarded, only an indirect injury to the cargo; so far as the pipe itself was concerned, the pipe was intact; the mismanagement of the pipe was a mismanagement of it in working the pipe *qua* pipe, as I have said, and as part of the vessel. When I look at all these facts of the case, the conclusion I have come to is that *this engineer was guilty of an act of negligence in the management of the ship regarded as a vessel, and even regarded as a vessel carrying cargo.* In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation of sect. 3 of the Act." (Italics ours.)

In

The Rodney, 9 Asp. M. C. 39,

the negligent puncturing of a drainage pipe, which permitted water to reach and damage cargo, was held to be negligence in the management of the ship within the exemption of the Harter Act. In speaking of what is meant by the words "management of the ship", as used in the Act, Barnes, J., said:

“It seems to me that they extend to the proper handling of the ship as affecting the safety of the cargo, and I agree with the president that the appeal should be allowed.”

The damage under consideration in

Knott v. Botany Worsted Mills, 179 U. S. 69, cited by appellees, was caused by negligence in the loading of the vessel. This court will note with interest, in view of the criticisms made of Circuit Judge Rogers, that the Supreme Court quoted with approval and at length from the opinion of District Judge Brown, whose opinions in the numerous cases we have cited lay down the principle upon which Circuit Judge Rogers based his opinion in the case which appellees concede upholds our contention. In the portion of his opinion quoted by the Supreme Court, Judge Brown said:

“The negligence consisted in stowing the wool far forward, without taking care subsequently that changes of loading should not bring the ship down by the head. I must therefore regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship.
* * * The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship’s trim, or on the sugar drainage.”

In a part of the opinion not quoted by the Supreme Court, Judge Brown carefully pointed out that his decision was based upon negligence in loading and nothing else. So clearly does this appear that we quote it:

“The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head” (76 Fed. 582, 583).

In

The Persiana, 185 Fed. 396,

cited by appellees, the decision of the Circuit Court of Appeals for the Second Circuit decides nothing in point with the particular question now claiming this court's attention, so that it cannot be said that Judge Rogers, in deciding *U. S. v. N. Y. & O. S. S. Co.*, following Judge Brown's decision in *The Guadeloupe*, overrules *The Persiana*.

In the present case, the negligence charged is in not covering the hatch to prevent damage to a portion of the cargo from heat which developed in other cargo. The hatch was a part of the ship's equipment, *qua* ship, not primarily intended to protect the cargo. The failure to use the hatches, on the theory advanced, resulted in damage to the cargo. Such failure was not, however, in caring for the cargo, but in *not* utilizing the ship's equipment for the purpose to which it is said it ought to have been applied in this special instance.

In *The Jean Bart*, the negligence consisted in the failure to use equipment installed in the ship for the *specific* purpose of preserving the cargo. In *Knott v. Botany Worsted Mills* and in *The Germanic*, the negli-

gence did not consist of a failure to use the ship's equipment, but in loading and unloading, respectively, the cargo.

On the other hand, in *The Ontario* and *The British King* and *The Guadeloupe* and *U. S. v. N. Y. etc S. S. Co.*, as in the case at bar, if there was negligence, the negligence consisted in the failure to use a part of the ship's equipment *not primarily intended* for the safeguarding of the cargo; and in *Rowson v. Atl. Trans. Co.*, the negligence was in not properly using equipment *not solely intended* for the cargo. In all of those cases, to apply the principle announced by Barnes, J., in *The Rodney*, the failure was in the handling of the ship's equipment, which affected the cargo. It was not a failure to use something primarily intended to preserve the cargo.

It is in this that the present case is to be distinguished from those cases upon which appellees rely.

We respectfully submit that if there was any negligence in the officers and crew of the "Skipton Castle" not raising and moving the cargo and closing the hatch, it was negligence in the management of the vessel within the exemption of the Harter Act.

SUMMARY.

We respectfully submit that the decree of the District Court should be reversed and the cause remanded with instructions to dismiss the libel with costs, for the following reasons:

1. That, it appearing that the injury to the cargo was clearly within the specific exceptions of the bills of lading against heat, breakage, rust, decay, wastage, damage to wrappers, etc., the burden of proof was upon appellees to show that the damage was caused by the negligence of appellant, its officers or agents.

2. That appellees have not sustained the burden of proving that the damage in question was caused by negligence.

3. That the evidence shows that the "Skipton Castle" was in all respects seaworthy.

4. That the evidence shows that there was no negligence in the stowage, care, custody or delivery of the cargo.

5. That if there was any negligence in not moving and raising the cargo and closing the hatch, it was negligence in the management of the vessel within the exemption of the Harter Act.

Dated, San Francisco,

August 21, 1916.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,
Plaintiff in Error,
vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue
Fourth California District,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

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F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Northern
District of California.*

THE GOLDFIELD CONSOLIDATED MINES
CO., a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue
Fourth California District,

Defendant.

Complaint.

FIRST CAUSE OF ACTION.

Comes now the plaintiff above named and for a
first cause of action against the defendant alleges:

I.

That the plaintiff is a corporation duly organized
and existing under the laws of the State of Wyoming
and doing business in the State of Nevada and hav-
ing its principal office and place of business in Gold-
field, County of Esmeralda, State of Nevada.

II.

That the defendant is a duly appointed, qualified
and acting Collector of Internal Revenue of the
Department of the Treasury of the United States of
America for the 4th District of California, which
District includes the State of Nevada, and as such
Collector of Internal Revenue, is a duly qualified and
authorized successor in office to one W. A. Shippee,
who was prior to the — day of —, 19—, the
Collector of Internal Revenue for said District and
predecessor in office of said Jos. J. Scott, and as such

qualified Collector of Internal Revenue has succeeded to all of the duties, obligations and legal liabilities which existed at the time of the going out of office of the said W. A. Shippee as aforesaid and all of said legal liabilities, duties and obligations remain in full force and effect as to said successor in office, the [1*] defendant, Jos. J. Scott, the present Collector of Internal Revenue for said District.

III.

That on or about the 30th day of June, 1910, the said W. A. Shippee, acting in his then official capacity as Collector of Internal Revenue as aforesaid, and assuming to act in such capacity under the act of Congress, approved August 5th, 1909, entitled "An Act to provide revenue; equalize duties and encourage the industries of the United States and for other purposes," and assuming to act particularly under section 38 of said act, did by force and duress and threat of statutory penalties, exact, demand and collect from said plaintiff the sum of \$41,890.91, claiming the said sum to be a tax lawfully levied under an assessment, likewise claimed to have been lawfully assessed under said act on account of tax alleged to be due thereunder from said plaintiff to the United States of America for the year ending December 31st, 1909.

IV.

That said tax of \$41,890.91 was imposed upon this plaintiff and collected by said United States through W. A. Shippee, the then Collector of Internal Revenue, pursuant to a pretended assessment of the net

*Page-number appearing at foot of page of original certified Record.

income of the plaintiff for the said year upon a pretended assessment thereof of \$4,189,091.61, the said tax being at the rate of one per cent calculated thereon.

V.

That said sum of \$41,890.91 was paid from the funds and property of said plaintiff as aforesaid involuntarily and under a written protest, said plaintiff protesting that it was not liable to said assessment and to the payment of said tax, for the reasons more fully set forth in said protest and in part for the reason that under said act of Congress as aforesaid, the plaintiff was entitled to a deduction against its gross income for the [2] item of depreciation fully explained and set forth in its return of annual net income for the year 1909 for the value in the ground before it was mined of 230,463 tons of ore of the value in the ground before it was mined of \$5,646,940.46, which ore constitutes exhaustion of the capital value of the property owned by said plaintiff as in said protest and in said return of annual net income was fully set forth and deduction claimed therefor by reason thereof.

VI.

That thereafter and on or about August 2d, 1911, this plaintiff duly filed with said W. A. Shippee, the then Collector of Internal Revenue as aforesaid, a claim for the refunding of said tax of \$41,890.91 so collected as aforesaid on form 46 as revised November, 1907, which said claim was sworn to by A. H. Howe, Secretary and Treasurer of the plaintiff corporation and on its behalf according to law and

appealed to the Commissioner of Internal Revenue of the United States from the action and decision of the said W. A. Shippee, the then Collector of Internal Revenue as aforesaid, and thereunder and thereby pursuant to law asked for and claimed to have refunded the said tax, and represented to the Commissioner of Internal Revenue that the same should be refunded for the following reasons: "That the act of Congress approved August 5th, 1909, and department regulations thereunder, entitled the Goldfield Consolidated Mines Company, claimant herein, to a deduction against net income equal to the value in the ground before it was mined of all ores mined and removed during the year to which the return related and for which the tax was assessed which claimed deduction was shown, by slip attached to the return of annual net income and made a part thereof, to amount to the sum of \$5,646,940.46, and all of which mining constituted an exhaustion of the capital assets of the Goldfield Consolidated Mines Company and a depreciation within the meaning of the act in question, [3] which deduction should have been allowed and would have more than offset the total net income of the company; and protest was seasonably made at the time of the payment of said tax upon that ground."

VII.

Plaintiff furthermore alleges that after the filing of this claim for refund of the said tax as hereinabove set forth, and while said claim and appeal were pending before said Commissioner of Internal Revenue, this plaintiff by its duly authorized officials

appeared before the said Commissioner of Internal Revenue and there made full explanation and offered full proof of the correctness in all respect to the Commissioner of its return of annual net income for the year 1909 and of all statements of fact contained therein, and of its reasons for the support of said claim of refund, and during the pendency and consideration of said claim by said Commissioner of Internal Revenue, this plaintiff was duly and regularly granted by said Commissioner until and including the 24th day of January, 1912, within which to fully comply with the rules and regulations of the Treasury Department and the further requirements of the Commissioner of Internal Revenue, within which time the plaintiff was also given leave to present to the said Commissioner of Internal Revenue an amended statement and return of annual net income of said plaintiff for the year 1909, together with explanations of fact in support thereof, and among the requirements so made by the said Commissioner of Internal Revenue together with rules and regulations of the Treasury Department, this plaintiff was instructed to and did ascertain the unit cost per ton of the estimated ore bodies belonging to the plaintiff in its various mining properties as of January 1st, 1909, and the estimated value of the ore in the ground before it was mined for the year 1909, by multiplying the said ascertained unit cost per ton by the total number of tons [4] mined in said year 1909; furthermore this plaintiff was required by the said Commissioner of Internal Revenue and did by a like calculation for the said year 1909, and all

previous years, ascertain the total exhaustion of ore which at that time had taken place in the operation of its mining properties, and having so ascertained said amount, was required by the Commissioner of Internal Revenue and did enter the corresponding amount thereof of said tonnage exhausted multiplied by said unit cost per ton in its official corporate books of account, and did furthermore, pursuant to said requirements of said Commissioner, in its printed annual report of that current year make explanation to all of its stockholders and to the public that such changes and corrections had been made in its books of account, which changes were then and there shown in the figures and statements contained in said annual report, and did thus make full explanation to all of its stockholders and to the public of its reasons as hereinabove set forth for the making of such changes; that by making said calculations and changes and by basing its amended return on the result thereof, which amended return of annual net income was duly filed within the time granted for the making and filing of said return as hereinabove set forth, it was made to appear to the Commissioner of Internal Revenue that said plaintiff, while not waiving its claim to the full deduction for depreciation, asked for and claimed in its original return of annual net income for the year 1909, nevertheless found and reported that by strict compliance with the rules, regulations and requirements of the Treasury Department as hereinabove set forth and by applying the unit cost per ton to the tonnage so mined it was even under said rules, regulations and

requirements entitled to the deduction for depreciation therein of the sum of \$3,770,374.68, and that including the said deduction together with the statutory deduction of \$5,000 provided by law resulted in a [5] showing of net income subject to the tax of \$765,380.02, and this plaintiff further alleges that according to the rules and regulations and requirements of the Treasury Department of the United States and of the Commissioner of Internal Revenue said amount subject to the tax is correct and true in all respects; nevertheless, in disobedience and disregard of the law and of the rules and regulations of the Treasury Department, the Commissioner of Internal Revenue for the 4th District of California, defendant herein, did disallow and refuse to recognize the claim and appeal of this plaintiff for the refund of said tax or any part thereof.

VIII.

That thereafter on or about the 29th day of December, 1913, the Collector of Internal Revenue, Joseph J. Scott, defendant herein, did, claiming to act, pursuant to the instructions of the Commissioner of Internal Revenue, disallow and deny in whole the said plaintiff's said claim and appeal for the refund of said tax, and did notify said plaintiff to this effect.

IX.

That no part of sad tax of \$41,890.91 has been refunded or paid back or returned to said plaintiff or to any person or at all, and that said sum is still due and unpaid.

SECOND CAUSE OF ACTION.

For a second, further and separate cause of action against the defendant, plaintiff alleges: -

I.

That the plaintiff is a corporation duly organized and existing under the laws of the State of Wyoming and doing business in the State of Nevada and having its principal office and place of business in Goldfield, county of Esmeraldo, State of Nevada. [6]

II.

That the defendant is a duly appointed, qualified and acting Collector of Internal Revenue of the Department of the Treasury of the United States of America for the 4th District of California, which district includes the State of Nevada, and as such Collector of Internal Revenue, is a duly qualified and authorized successor in office to one W. A. Shippee, who was prior to the — day of —, 19—, the Collector of Internal Revenue for said district and predecessor in office of said Jos. J. Scott, and as such qualified Collector of Internal Revenue has succeeded to all of the duties, obligations and legal liabilities which existed at the time of the going out of office of the said W. A. Shippee as aforesaid, and all of said legal liabilities, duties and obligations remain in full force and effect as to said successor in office, the defendant, Jos. J. Scott, the present Collector of Internal Revenue for said district.

III.

That on or about the 14th day of August, 1911, the said W. A. Shippee, acting in his then official capacity as Collector of Internal Revenue as aforesaid

and assuming to act in such capacity under the act of Congress, approved August 5th, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," and assuming to act particularly under section 38 of said act, did by force and duress and threat of statutory penalties, exact, demand and collect from said plaintiff the sum of \$49,681.02, claiming the sum to be a tax lawfully levied under an assessment, likewise claimed to have been lawfully assessed under said act on account of tax alleged to be due thereunder from said plaintiff to the United States of America for the year ending December 31st, 1910. [7]

IV.

That said tax of \$49,681.02 was imposed upon this plaintiff and collected by said United States through W. A. Shippee, the then Collector of Internal Revenue, pursuant to a pretended assessment of the net income of the plaintiff for the said year upon a pretended assessment thereof of \$4,968,102.45, the said tax being at the rate of one per cent calculated thereon.

V.

That said sum of \$49,681.02 was paid from the funds and property of said plaintiff as aforesaid involuntarily and under a written protest, said plaintiff protesting that it was not liable to said assessment and to the payment of said tax, for the reasons more fully set forth in said protest, and in part for the reason that under said act of Congress as aforesaid, the plaintiff was entitled to a deduction against

its gross income for the item of depreciation fully explained and set forth in its return of annual net income for the year 1910 for the value in the ground before it was mined of 227,854 tons of ore of the value in the ground before it was mined of \$7,499,-406.14, which ore constitutes exhaustion of the capital value of the property owned by said plaintiff as in said protest and in said return of annual net income was fully set forth and deduction claimed therefor by reason thereof.

VI.

That thereafter and on or about August 2d, 1911, this plaintiff duly filed with said W. A. Shippee, the then Collector of Internal Revenue as aforesaid, a claim for the refunding of said tax of \$49,681.02 so collected as aforesaid on form 46 as revised November, 1907, which said claim was sworn to by A. H. Howe, Secretary and Treasurer of the plaintiff corporation, and on its behalf according to law, and appealed to the Commissioner of Internal Revenue of the United States from the action and decision of the said W. A. Shippee, the then Collector of Internal Revenue as [8] aforesaid, and thereunder and thereby pursuant to law asked for and claimed to have refunded the said tax and represented to the Commissioner of Internal Revenue that the same should be refunded for the following reasons: "The said tax purports to have been assessed for income taxes of said corporation for the year 1910. Claimant contends that the act of Congress, approved August 5th, 1909, and department regulations thereunder, entitled *The Goldfield Consolidated Mines*

Company, claimant herein, to a deduction against net income equal to the value in the ground before it was mined of all ores mined and removed during the year to which the return related, and for which the tax was assessed, which claimed deduction was shown, by slip attached to the return of annual net income and made a part thereof, to amount to the sum of \$7,499,406.14, and all of which mined ore constituted an exhaustion of the capital assets of The Goldfield Consolidated Mines Company, and its value in the ground constituted a depreciation within the meaning of the act in question, which deduction should have been allowed, and would have more than offset the total net income of the company; and protest was made upon that ground immediately prior to the payment of said tax.

“The time expired on June 1st, 1911, in which the Commissioner of Internal Revenue could assess a tax under said act, and no tax was assessed until long after, to wit, on or about July 28th, 1911, as more fully shown in protest, a copy of which is enclosed hereinwith.”

VII.

Plaintiff furthermore alleges that after the filing of this claim for the refund of the said tax as hereinabove set forth and while said claim and appeal were pending before said Commissioner of Internal Revenue, this plaintiff by its duly authorized officials appeared before the said Commissioner of Internal Revenue and there made full explanation and offered full proof of the correctness [9] in all respects to the Commissioner of its return of annual net income

for the year 1910 and of all statements of fact contained therein, and of its reasons for the support of said claim of refund, and during the pendency and consideration of said claim by said Commissioner of Internal Revenue, this plaintiff was duly and regularly granted by said Commissioner until and including the 28th day of January, 1912, within which to fully comply with the rules and regulations of the Treasury Department and the further requirements of the Commissioner of Internal Revenue, within which time the plaintiff was also given leave to present to the said Commissioner of Internal Revenue an amended statement and return of annual net income of said plaintiff for the year 1910, together with explanations of fact in support thereof, and among the requirements so made by the said Commissioner of Internal Revenue together with rules and regulations of the Treasury Department, this plaintiff was instructed to and did ascertain the unit cost per ton of the estimated ore bodies belonging to the plaintiff in its various mining properties as of January 1st, 1909, and the estimated value of the ore in the ground before it was mined for the year 1910 by multiplying the said ascertained unit cost per ton by the total number of tons mined in said year 1910; furthermore, this plaintiff was required by the said Commissioner of Internal Revenue and did by a like calculation for the said year 1910 and all previous years, ascertain the total exhaustion of ore which at that time had taken place in the operation of its mining properties, and having so ascertained said amount was required by the Commissioner of Inter-

nal Revenue and did enter the corresponding amount thereof of said tonnage exhaustion multiplied by said unit cost per ton in its official corporate books of account, and did furthermore, pursuant to said requirements of said Commissioner, in its printed [10] annual report of that current year, make explanation to all of its stockholders and to the public that such change and corrections had been made in its books of account, which changes were then and there shown in the figures and statements contained in said annual report, and did thus make full explanation to all of its stockholders and to the public of its reasons as hereinabove set forth for the making of such changes; that by making said calculations and changes and by basing its amended return on the result thereof, which amended return of annual net income was duly filed within the time granted for the making and filing of said return as hereinabove set forth, it was made to appear to the Commissioner of Internal Revenue that said plaintiff, while not waiving its claim to the full deduction for depreciation asked for and claimed in its original return of annual net income for the year 1910, nevertheless found and reported that by strict compliance with the rules, regulations and requirements of the Treasury Department as hereinabove set forth and by applying the unit cost per ton to the tonnage so mined, it was even under said rules, regulations and requirements entitled to a deduction for depreciation therein to the sum of \$4,545,691.44, and that including the said deduction, together with the statutory deduction of \$5,000 provided by law, resulted in

a showing of net income subject to the tax of \$428,-459.97, and this plaintiff further alleges that according to the rules and regulations and requirements of the Treasury Department of the United States and of the Commissioner of Internal Revenue, said amount subject to the tax is correct and true in all respects; nevertheless in disobedience and disregard of the law and of the rules and regulations of the Treasury Department, the Commissioner of Internal Revenue for the 4th District of California, defendant herein, did disallow and refuse to recognize the claim and [11] appeal of this plaintiff for the refund of said tax or any part thereof.

VIII.

That thereafter on or about the 29th day of December, 1913, the Collector of Internal Revenue, Joseph J. Scott, defendant herein, did, claiming to act pursuant to the said instructions of the Commissioner of Internal Revenue disallow and deny in whole the said plaintiff's said claim and appeal for the refund of said tax, and did notify said plaintiff to this effect.

IX.

That no part of said tax of \$49,681.02 has been refunded or paid back or returned to said plaintiff or to any person or at all, and that said sum is still due and unpaid.

X.

The plaintiff further alleges that on June 1st, 1911, expired the time in which the Commissioner of Internal Revenue had power under the law to assess the tax under said act of Congress, and no taxes were

in fact assessed until long after the said date, to wit, on or about July 28th, 1911, as more fully shown in the protest filed by the plaintiff at the time of payment of said tax.

WHEREFORE the plaintiff prays for judgment against the defendant in the sum of \$41,890.91, on account of the matters and things set out in the first cause of action herein and for the sum of \$49,681.02 on account of the matters and things set out in the second and separate cause of action hereinabove set out, and for its costs, and for such further relief as may be just in the premises.

HENRY M. HOYT,
L. A. GIBBONS,
L. N. FRENCH,

Attorneys for Plaintiff, Reno, Nevada. [12]

State of Nevada,
County of Esmeralda,—ss.

A. H. Howe, being first duly sworn, deposes and says that the above-named plaintiff is a corporation; that he is an officer of said plaintiff, to wit, the Secretary thereof, and makes this affidavit on behalf of said Corporation; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

A. H. HOWE.

PEAR, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 22d day of June in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and thirty-eighth.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [14]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 22 day of June, 1914, and personally served the same on the 22 day of June, 1914, *upon* by delivering to, and leaving with Jos. J. Scott, as Collector, etc., said defendant named therein personally, at the City of S. F., County of San Francisco, in said District, a certified copy thereof, together with a

copy of the complaint, certified to by _____,
attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By Thos. F. Mulhall,
Office Deputy.

San Francisco, June 22, 1914.

[Endorsed]: Filed Jun. 23, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO., a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Demurrer to Complaint.

Now comes Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, defendant in the above-entitled action, and demurs to the complaint of the plaintiff on file herein and to each of the counts in said complaint contained, and for grounds of demurrer specifies:

I.

That the said complaint does not state facts suffi-

cient to constitute a cause of action against the defendant.

II.

That the first count of said complaint does not state facts sufficient to constitute a cause of action against the defendant.

III.

That the second count of said complaint does not state facts sufficient to constitute a cause of action against the defendant.

WHEREFORE, having fully answered said complaint, said defendant prays that it may be hence dismissed and that the defendant have judgment for costs of suit incurred herein.

JNO. W. PRESTON,
United States Attorney,
Attorney for Defendant.

M. A. THOMAS,
Assistant United States Attorney. [16]

The undersigned, one of the attorneys for the said defendant Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, hereby certifies that in his opinion the foregoing demurrer is well founded in point of law and that it is not interposed for delay.

M. A. THOMAS.

[Endorsed]: Filed Jul. 2, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk, [17]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 29th day of November, in the year of our Lord one thousand nine hundred and fifteen. Present, The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO.,

vs.

JOSEPH J. SCOTT, as Collector, etc.

Order Sustaining Demurrer and Dismissing Cause.

Defendant's demurrer to the complaint heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that said demurrer be and the same is hereby sustained, and that this cause be and the same is hereby dismissed. [18]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 29th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO.,

vs.

JOSEPH J. SCOTT, as Collector, etc.

Order for Judgment of Dismissal.

Upon motion of M. A. Thomas, Assistant United States Attorney, it is ordered that a judgment of dismissal, with costs to defendant, be entered herein.
[19]

*In the District Court of the United States, in and
for the Northern District of California Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO., a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Judgment of Dismissal on Sustaining Demurrer.

The Court having sustained defendant's demurrer to the complaint and ordered that this cause be dismissed, and having upon motion of M. A. Thomas, Assistant United States Attorney, attorney for defendant further ordered that judgment be entered herein accordingly, with costs to the defendant:

Now, therefore, by virtue of the law and by reason

of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at \$14.20.

Judgment entered December 29, 1915.

WALTER B. MALING,
Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed December 29, 1915. Walter B. Maling, Clerk. [20]

*In the District Court of the United States for the
Northern District of California.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO., a Corpn.,

vs.

JOSEPH J. SCOTT, as Collector, etc.

(Clerk's Certificate to Judgment-roll.)

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 29th day of December, 1915.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed December 29, 1915. Walter B. Maling, Clerk. [21]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
CO., a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

(Memorandum Opinion.)

HOYT, GIBBONS & FRENCH, Attorneys for
Plaintiff.

JOHN W. PRESTON, U. S. Attorney, for
Defendant.

VAN FLEET, District Judge:

The reasoning and conclusion of the Court in Stratton's Independence, Limited, v. Howbert, 131 U. S. 399, with consideration for all the implications to be drawn therefrom, in my judgment fully negative the theory upon which plaintiff's alleged cause of action proceeds, and preclude recovery upon the facts stated; and upon the authority of that case the demurrer must be sustained and the action dismissed.

[Endorsed]: Filed November 29, 1915. Walter B. Maling, Clerk. [22]

*In the District Court of the United States in and for
the Northern District of California.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

**Stipulation and Order Extending Time [to Prepare
Bill of Exceptions].**

It is hereby stipulated that the time of the above-named plaintiff to prepare its bill of exceptions on appeal in the above-entitled cause may be extended thirty (30) days from and after the 3d day of March, 1916.

Dated March 3d, 1916.

JNO. W. PRESTON,

Attorney for Defendant.

In accordance with the foregoing stipulation it is hereby ordered that the Goldfield Consolidated Mines Company, plaintiff in the above-entitled action, may have and is hereby given thirty (30) days from and after the 3d day of March, 1916, within which to prepare and file its bill of exceptions on appeal in the above-entitled action.

Dated this 3d day of March, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed March 3d, 1916. Walter B. Malin, Clerk. [23]

*In the District Court of the United States, in and
for the Northern District of California Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

**Bill of Exceptions on Behalf of The Goldfield
Consolidated Mines Company, a Corporation,
Plaintiff in Error Herein.**

BE IT REMEMBERED, that on the 10 day of August, A. D. 1914, at a stated term of said Court, begun and holden in the city of San Francisco, State of California, before his Honor, WILLIAM C. VAN FLEET, District Judge, the issue of law joined in the above-stated cause between the said parties upon the complaint of plaintiff and the demurrer of the defendant, as shown by the judgment-roll and record herein, came on to be heard before the said Judge, the parties aforesaid by their counsel having according to the statute in such cases made and provided and in accordance with the rules of said court, argued said cause and submitted their respective briefs thereon; and thereafter, on the 29th day of Novem-

ber, A. D. 1915, the said Court sustained the said demurrer to said complaint, and to each count thereof, to which ruling said plaintiff, The Goldfield Consolidated Mines Company, a corporation, duly excepted, and now assigns the said ruling as error, and in and by the order sustaining said demurrer, the said Court ordered that said cause be, and the same was thereby dismissed, to which ruling said plaintiff, The Goldfield Consolidated Mines Company, a corporation, duly excepted and now assigns the [24] said ruling as error; and,

BE IT REMEMBERED, that thereafter, to wit, on the 29th day of December, A. D. 1915, said Court gave, made, rendered and entered its order directing that judgment be entered in the above-entitled cause in favor of the defendant therein, and that said defendant do have and recover of and from the plaintiff his costs herein expended, to which order said plaintiff, The Goldfield Consolidated Mines Company, a corporation, noted and reserved an exception, and now assigns the giving, making, rendering and entering of said order as error; and

BE IT FURTHER REMEMBERED, that thereafter, on the 29th day of December, 1915, said Court made and entered its judgment dismissing said action and in favor of said defendant and to the effect that said defendant do have and recover of and from said plaintiff his costs herein expended, taxed in the sum of fourteen and 20/100 dollars, to which judgment plaintiff, The Goldfield Consolidated Mines Company, a corporation, duly excepted, and now as-

signs said judgment as error.

And to the end that justice and right may be done, the said plaintiff, The Goldfield Consolidated Mines Company, a corporation, hereby presents the foregoing as its bill of exception herein, and prays that this said bill of exceptions herein be settled, allowed and approved as true and correct in all particulars, and be made a part of the records in the above-entitled cause.

Dated San Francisco, California, March 27th, A. D. 1916.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY, a Corporation,
Plaintiff, and Plaintiff in Error Herein,
By HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,

Attorneys for said Plaintiff and Plaintiff in Error.

[25]

To Joseph J. Scott as Collector of Internal Revenue,
Fourth California District, Defendant, and Defendant in Error, and to John W. Preston, Esq.,
United States Attorney for the Northern District of California, at San Francisco, His Attorney:

Gentlemen: You will please take notice that the foregoing constitutes and is the bill of exceptions of the plaintiff, The Goldfield Consolidated Mines Company, a corporation, in the above-entitled cause, and that said plaintiff will ask the settlement, allowance and approval of the same.

March 27th, A. D. 1916.

HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT, -

Attorneys for Plaintiff and Plaintiff in Error.

[Stipulation Re Bill of Exceptions.]

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is true and correct in all particulars, and that the same may be settled, allowed and approved by said Court without further notice, and that the same may be made a part of the records in the above-entitled cause.

Dated San Francisco, California, March 27th, A. D. 1916.

JOSEPH J. SCOTT,
As Collector of Internal Revenue, Fourth California District,

By JNO. W. PRESTON,
U. S. Attorney,
Attorney for Defendant and Defendant in Error herein.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY, a Corporation,
By HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,
Attorneys for Plaintiff and Plaintiff in Error Herein.
[26]

[Order Settling, Allowing and Approving Bill of Exceptions, etc.]

United States of America,
Northern District of California,—ss.

In the matter of the foregoing Bill of Exceptions, duly presented in time by the plaintiff, The Goldfield

Consolidated Mines Company, a corporation, plaintiff in error herein;

IT IS HEREBY ORDERED by said Court that said bill of exceptions be and the same is hereby settled, allowed and approved as true and correct in all particulars; and

IT IS HEREBY FURTHER ORDERED by said Court that said bill of exceptions be and the same is hereby made a part of the records in the above-entitled cause.

Given, made and dated at San Francisco, California, this 27th day of March, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Mar. 27, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Notice of Petition for Writ of Error.

To Joseph J. Scott, as Collector of Internal Revenue,
Fourth California District, and to Hon. John
W. Preston, United States Attorney for the
Northern District of California at San Fran-
cisco, His Attorney:

You, and each of you will please take notice hereby that on Monday, the 27th day of March, A. D. 1916, we shall present to the above-entitled court the petition for writ of error and assignment of errors herein, and shall move said Court to allow said writ of error and to direct the issuance of the same and of the citation herein. Copies of said petition for writ of error and of the assignment of errors herein are made a part of this notice attached hereto and served herewith.

Dated San Francisco, California, March 27th,
A. D. 1916.

THE GOLDFIELD MINES COMPANY,
a Corporation,

Petitioner and Plaintiff in Error.

By HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,

Its Attorneys.

Due service of the foregoing notice and receipt of copies of the various papers therein referred to are

hereby admitted this 27th day of March, A. D. 1916.

JOSEPH J. SCOTT,

As Collector of Internal Revenue, Fourth California District.

The Defendant in Error,
By JNO. W. PRESTON,
United States Attorney.

His Attorney. [28]

[Endorsed]: Filed. Mar. 27, 1916. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[29]

*In the District Court of the United States in and
for the Northern District of California Second
Division.*

No. 15,755.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Petition for Writ of Error.

Your petitioner above named, the Goldfield Consolidated Mines Company, a corporation, plaintiff in the above-entitled action, brings this its petition for a writ of error to the District Court of the United States in and for the Northern District of California, and in that behalf your petitioner shows.

On the 29th day of November, A. D., 1915, in the

above-entitled cause, there was made and entered in the above-entitled court an order sustaining the demurrer of the defendant in said action to the complaint of plaintiff therein and to each count thereof and dismissing said cause; and that thereafter, on the 29th day of December, A. D. 1915, there was made, given, rendered and entered in the above-entitled court and cause a judgment against your petitioner herein, namely, said plaintiff, the Goldfield Consolidated Mines Company, a corporation, wherein and whereby it was adjudged that said cause be, and the same was, dismissed and that the defendant in said action, the said Joseph J. Scott as Collector of Internal Revenue, Fourth California District, do have and recover of and from said plaintiff, your petitioner herein, his costs herein expended taxed in the sum of Fourteen and 20/100 Dollars. [30]

And your petitioner further shows that it is advised by counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving, rendition and entry of said judgment, to the great injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of the said record and by an examination of the bill of exceptions of your petitioner tendered and filed herein and in the assignment of errors hereinafter set out; and to that end thereafter that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a

writ of error may be issued therefrom to the said District Court of the United States for the Northern District of California, returnable according to law and the practice of the court and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause, and that the same may be removed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected; and full and speedy justice done your petitioner.

And your petitioner now makes the assignment of errors attached hereto upon which it will rely and which will be made to appear by return of the said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as herein prayed, that the assignment of errors annexed hereto may be considered as plaintiff's assignment of errors upon the writ and that the judgment rendered in this cause and order sustaining said demurrer may be reversed and held for naught, and that the said cause be remanded for further proceedings, that your petitioner be awarded all necessary process and that [31] the amount of the supersedeas bond be fixed.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY, a Corporation,
Petitioner.

HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,

Attorneys for said Petitioner.

Service of the foregoing petition for writ of error and receipt of a copy thereof are hereby admitted this 27th day of March, A. D. 1916.

JOSEPH J. SCOTT,
As Collector of Internal Revenue, Fourth California
District,

By JNO. W. PRESTON,
U. S. Attorney,
His Attorney.

[Endorsed]: Filed Mar. 27, 1916. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[32]

*In the District Court of the United States, in and
for the Northern District of California Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,
Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Reve-
nue, Fourth California District,
Defendant.

Assignment of Errors.

Now comes The Goldfield Consolidated Mines Com-
pany, a corporation, plaintiff in the above-entitled
cause and plaintiff in error herein, and having peti-
tioned for an order from said Court permitting it to
procure a writ of error to this Court, directed from
the United States Circuit Court of Appeals for the

Ninth Circuit, from the judgment made and entered in said cause against said plaintiff in error and petitioner herein, and files with its said petition the following assignments of error herein upon which it will rely for a reversal of said judgment upon said writ, and which said errors, and each and every of them, are to the great detriment injury and prejudice of the said plaintiff and in violation of its rights conferred upon it by law; and it says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Northern District of California; there is manifest error in this, to wit:

I.

That the said District Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiff on file herein upon the grounds set forth in said demurrer. [33]

II.

That the said District Court erred in sustaining the demurrer of the defendant to the first count of said complaint upon the grounds set forth in said demurrer.

III.

That the said District Court erred in sustaining the demurrer of the defendant to the second count of said complaint upon the grounds set forth in said demurrer.

IV.

That the said District Court erred in ordering the said action to be dismissed without granting to the

plaintiff therein any opportunity to amend said complaint or to file an amended complaint.

V.

That said District Court erred in dismissing said action.

VI.

That said District Court erred in ordering and entering judgment in favor of the defendant in said action.

VII.

That said District Court erred in not giving, making and entering its order in said action overruling said demurrer to said complaint and to each of the counts thereof.

VIII.

That said District Court erred in not overruling the demurrer to the plaintiff's complaint and to each count thereof, inasmuch as it appeared from said complaint, and from each count thereof, that the plaintiff had complied with all the regulations and requirements of the Treasury Department governing the ascertaining of lawful deductions from gross income; that the said regulations were in all respects in accordance with law, and under the law and the regulations the deductions [34] claimed were legal and should not have been disallowed.

In order that the foregoing assignment or errors may appear of record, this plaintiff presents the same to the above-entitled court, and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided; and this plaintiff prays the re-

versal of the above-mentioned judgment heretofore given, rendered, made and entered, and filed by the above-entitled court and in the above-entitled action.

Dated San Francisco, California, March 27th,
A. D. 1916.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY, a Corporation,

Plaintiff,

By HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,

Its Attorneys.

United States of America,

Northern District of California,—ss.

I, the undersigned, one of the attorneys for the plaintiff in error herein, do hereby certify that the foregoing assignment or errors, is made on behalf of petitioner for a writ of error herein, and is in my opinion well taken, and the same now constitutes an assignment of errors upon the writ prayed for.

Dated San Francisco, California, March 27th,
A. D. 1916.

HENRY M. HOYT,

Of Attorneys for Plaintiff in Error.

Due service of the foregoing assignment of errors and receipt of a copy thereof are hereby admitted this 27th day of March, A. D. 1916.

JOSEPH J. SCOTT,

As Collector of Internal Revenue, Fourth California District,

Defendant.

By JNO. W. PRESTON,

U. S. Attorney,

His Attorney. [35]

[Endorsed]: Filed Mar. 27, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

*In the District Court of the United States, in the
Northern District of California.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Reve-
nue, Fourth California District,

Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

On motion of H. M. Hoyt, of the firm of Hoyt, Gibbons & French, attorneys for plaintiff and plaintiff in error in the above-entitled cause, it is hereby ordered that a Writ of Error from the judgment heretofore filed and entered herein, be and the same is hereby allowed for review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the record, stipulations, exhibits and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on the Writ of Error be fixed at the sum of Five Hundred Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages caused or to be

caused by the prosecution of said Writ of Error.

Dated this 27th day of March, 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Mar. 27, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [37]

*In the District Court of the United States, in and
for the Northern District of California.*

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN, that we, The Goldfield Consolidated Mines Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States, to be paid to him, his heirs, executors, administrators, and successors in office; to which payment, well and truly to be made, we bind ourselves, and each of us, and our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of March, 1916.

WHEREAS, the above-named The Goldfield Consolidated Mines Company has prosecuted a writ of error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment of the United States District Court, for the Northern District of California, in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above named, The Goldfield Consolidated Mines Company, shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make good its plea, [38] then this obligation shall be void; otherwise, to remain in full force and effect.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY,

By J. W. HUTCHINSON, [Seal]

Its General Manager.

Attest: A. H. HOWE,

Its Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By B. F. CATOR.

By BRADLEY CARR. [Seal]

Attorneys in Fact.

State of Nevada,

County of Esmeralda,—ss.

On the 31st day of March, A. D. one thousand nine hundred and sixteen, personally appeared before me, Benj. J. Henley, a notary public in and for said county of Esmeralda, A. H. Howe and J. W. Hutchinson, known to me to be the Secretary and General Mgr. of the corporation that executed the fore-

going instrument, and upon oath did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signature; and that the said corporation executed the said instrument freely and voluntarily and for the [39] uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the county of Esmeralda, the day and year in this certificate first above written.

[Seal]

BENJ. J. HENLEY,

Notary Public in and for the County of Esmeralda,
State of Nevada.

My Commission expires Nov. 10, 1917.

Approved this 3d day of April, A. D. 1916.

WM. C. VAN FLEET,

United States District Judge.

[Endorsed]: Filed April 3d, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[40]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Praeceptum for Transcript of Record

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Complaint.
2. Demurrer to Complaint.
3. Order Sustaining Demurrer and Dismissing Cause, made November 29, A. D. 1915.
4. Order Directing Entry of Judgment, made December 29th, A. D. 1915.
5. Judgment.
6. Bill of Exceptions on Behalf of Plaintiff in Error.
7. Minutes of Court for the following dates, to

wit: November 29, A. D. 1915, and December 29, A. D. 1915.

8. Notice of Petition for Writ of Error.
9. Petition for Writ of Error.
10. Assignment of Errors.
11. Supersedeas and Cost Bond.
12. Order Allowing Writ of Error. [41]
13. Writ of Error.
14. Citation.
15. This Praecipe.
16. Stipulation and Order of March 3, 1916, Relating to Time for Preparing Bill of Exceptions.
17. Opinion filed Nov. 29, 1915.

Said transcript to be prepared as required by law and the rules of this Court and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of the United States Circuit Court of Appeals before the 26 day of April, A. D. 1916.

Dated San Francisco, California, March 27, A. D. 1916.

THE GOLDFIELD CONSOLIDATED
MINES COMPANY, a Corporation,
Plaintiff in Error,
By HOYT, GIBBONS & FRENCH,
ALLEN G. WRIGHT,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed April 3, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing forty-two (42) pages, numbered from 1 to 42, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, in conformity with the praecipe for record filed herein, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing record to writ of error is \$22.60; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 12th day of April, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern Dis-
trict of California.

[Ten Cent Internal Revenue Stamp. Canceled
4/12/16. W. B. M.] [43]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Reve-
nue, Fourth California District,

Defendant.

Citation on Writ of Error.

United States of America,

Northern District of California,—ss.

To Joseph J. Scott, as Collector of Internal Revenue,
Fourth California District, Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit, to be holden in the city of
San Francisco in the State of California within
thirty (30) days from the date hereof, pursuant to
a writ of error duly issued and now on file in the
clerk's office of the United States District Court for
the Northern District of California, wherein The

Goldfield Consolidated Mines Company, a corporation, is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the writ of error mentioned should not be reversed, and why speedy justice should not be done the parties in that behalf. [44]

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of the United District Court for the Northern District of California, this 27th day of March, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge.

Service of the foregoing citation and receipt of a copy thereof are hereby admitted this 3d day of April, A. D. 1916.

JOSEPH J. SCOTT,
As Collector of Internal Revenue, Fourth California
District,

By JNO. W. PRESTON,
U. S. Attorney,
His Attorney. [45]

[Endorsed]: No. 15,775. In the District Court of the United States, Northern District of California, 2d Div. The Goldfield Consolidated Mines Company, a Corporation, Plaintiff, vs. Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, Defendant. Citation on Writ of Error. Filed Apr. 3, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,775.

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a Corporation,

Plaintiff,

vs.

JOSEPH J. SCOTT, as Collector of Internal Revenue,
Fourth California District,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judge of the District Court
of the United States for the Northern District
of California, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, or some of you,
between The Goldfield Consolidated Mines Com-
pany, a corporation, plaintiff in error, and Joseph
J. Scott as Collector of Internal Revenue, Fourth
California District, defendant in error, a manifest
error hath happened, to the great damage of said
plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been,
should be duly corrected and full and speedy justice
done to the party aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and [46] openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California within (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 27th day of March, in the year of our Lord, one thousand nine hundred and sixteen.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,
Judge of Said Court.

Service of the foregoing writ of error and receipt of a copy thereof, are hereby admitted, this 3d day of April, A. D. 1916.

JOSEPH J. SCOTT,
As Collector of Internal Revenue, Fourth California
District.

By JNO W. PRESTON,
U. S. Attorney,
His Attorney. [47]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was, on the 3d day of April, A. D. 1916, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal]

WALTER B. MALING,
Clerk United States District Court, Northern District of California.

By _____

Deputy Clerk. [48]

[Endorsed]: No. 15,775. District Court of the United States, Northern District of California, Second Division. The Goldfield Consolidated Mines Company, a Corporation, Plaintiff, vs. Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, Defendant. Writ of Error. Filed Apr. 3, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2777. United States Circuit Court of Appeals for the Ninth Circuit. The Goldfield Consolidated Mines Company, a Corporation, Plaintiff in Error, vs. Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed April 13, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2777

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE GOLDFIELD CONSOLIDATED MINES

COMPANY (a corporation),

Plaintiff in Error,

VS.

JOSEPH J. SCOTT, as Collector of Internal

Revenue, Fourth California District,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

HOYT, GIBBONS & FRENCH,

ALLEN G. WRIGHT,

Attorneys for Plaintiff in Error.

Filed

SEP 22 1916

Filed this.....day of September, 1916.

F. D. Monckton,

FRANK D. MONCKTON, *Clerk.*

Clerk.

By.....Deputy Clerk.

No. 2777

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE GOLDFIELD CONSOLIDATED MINES
COMPANY (a corporation),

Plaintiff in Error,

VS.

JOSEPH J. SCOTT, as Collector of Internal
Revenue, Fourth California District,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

Statement of the Case.

The writ of error herein, in which the Goldfield Consolidated Mines Company, a corporation, is plaintiff in error, and Joseph J. Scott, as Collector of Internal Revenue, Fourth California District, is the defendant in error, comes to this Court in the following manner:

The plaintiff in error filed and served its complaint in June, 1914 (Transcript, pages 1-15 inclu-

sive), in which it is stated that the predecessor of this defendant in the office of Collector of Internal Revenue levied a tax for the year 1909, against the plaintiff in error of forty-one thousand, eight hundred and ninety and $91/100$ (\$41,890.91) dollars, being one (1%) per cent of the total net production of the plaintiff in error for that year, such net production being four million, one hundred eighty-nine thousand, ninety-one and $61/100$ (\$4,189,091.61) dollars; that said levy was based upon an assessment which denied a claimed deduction of the value in the ground before it was mined of the 230,463 tons of ore mined in the year 1909, which constituted an exhaustion of the capital value of the property owned by the plaintiff in error; that the assessment and levy and payment of the tax were all duly protested; that thereafter on August 2, 1911, the plaintiff in error, in compliance with the Statutes of the United States (Revised Statutes 3220 and 3226) filed its claim for refund of said taxes erroneously collected, the claim being based upon the same grounds as the protests mentioned; that during the pendency before the Commissioner of Internal Revenue at Washington of the said claim of refund, the plaintiff in error appeared by its authorized officials in person before the Commissioner of Internal Revenue and there made full explanation and offered full proof of the correctness in all respects of its return of net income for the year 1909, and stated its reasons in support of said claim of refund, and during the pendency and consideration of said claim by the

Commissioner of Internal Revenue, the plaintiff in error was granted until and including the 24th day of January, 1912, within which to comply with the rules and regulations of the Treasury Department, and with further requirements of the Commissioner; that within the time so given, the plaintiff in error in full compliance with the rules and regulations and additional requirements imposed, submitted an amended return in which was ascertained and stated the unit cost per ton and resulting value as of January 1, 1909, of the tons of ore mined, and showed both in said return and in its own records and published official statements, a resulting deduction for depreciation in the sum of three million seven hundred and seventy thousand, three hundred and seventy-four and 68/100 (\$3,-770,374.68) dollars, which with other legal deductions resulted in and showed the net income for that year to be seven hundred sixty-five thousand three hundred eighty and 02/100 (\$765,380.02) dollars, which showing is alleged in the complaint to be correct and true in all respects; the complaint further showed that in disobedience and disregard of the law, the rules and the regulations, the Commissioner disallowed and refused to recognize the claim and appeal of the plaintiff for the refund of said tax or any part thereof; the complaint further shows that the disallowance and denial of the Commissioner was communicated by the Collector of Internal Revenue and due notice given to the plaintiff in error and that no part of said tax of forty-one

thousand eight hundred ninety-one and $91/100$ (\$41,891.91) dollars, has been refunded or paid back, and the same is still due and unpaid.

The second cause of action contained in the complaint was for the year 1910, and is substantially in all respects like the first cause of action with the exception of the different amounts in tonnage and money, the tax collected for the year 1910, being forty-nine thousand, six hundred eighty-one and $02/100$ (\$49,681.02) dollars, based upon a net realization for that year of ~~seven million, four hundred~~ **four million, nine hundred sixty eight, $14/100$ thousand, one hundred two and $45/100$** (\$4, 968,102.45) d pay-

ment of the tax having been in like manner protested and statutory application for refund made, and during the pendency of the application for refund before the Commissioner of Internal Revenue, a like showing, amended return and resulting depreciation of four million, five hundred forty-five thousand, six hundred ninety-one and $44/100$ (\$4,545,691.44) dollars being shown, resulting with other legal deductions in a net income subject to the tax of four hundred twenty-eight thousand, four hundred fifty-nine and $97/100$ (\$428,459.97) dollars; the complaint further showed the disallowance, denial and notice thereof through the collector to the plaintiff in error.

To this complaint, the above statement of which is of course a brief summary, the defendant in error demurred, and to each cause of action therein stated, which demurrer was sustained and judgment of

dismissal entered December 29, 1915 (Transcript, pages 20-22 inclusive). Thereafter a bill of exceptions was duly filed (Transcript, pages 25-29 inclusive), petition for writ of error and other formal proceedings taken (Transcript, pages 30-34 inclusive), assignment of errors (Transcript, pages 34-37 inclusive), order allowing writ of error and bond on writ of error (Transcript, pages 38-41 inclusive), and citation and writ of error issued March 27, 1916 (Transcript, pages 45-48 inclusive).

The errors assigned are brief and for the convenience of the Court we hereby specify the following errors upon which we rely:

SPECIFICATION OF ERRORS RELIED UPON.

I.

That the said District Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiff on file herein upon the grounds set forth in said demurrer.

II.

That the said District Court erred in sustaining the demurrer of the defendant to the first count of said complaint upon the grounds set forth in said demurrer.

III.

That the said District Court erred in sustaining the demurrer of the defendant to the second

count of said complaint upon the grounds set forth in said demurrer.

V.

That said District Court erred in dismissing said action.

VI.

That said District Court erred in ordering and entering judgment in favor of the defendant in said action.

VII.

That said District Court erred in not giving, making and entering its order in said action overruling said demurrer to said complaint and to each of the counts thereof.

VIII.

That said District Court erred in not overruling the demurrer to the plaintiff's complaint and to each count thereof, inasmuch as it appeared from said complaint, and from each count thereof, that the plaintiff had complied with all the regulations and requirements of the Treasury Department governing and ascertaining of lawful deductions from gross income; that the said regulations were in all respects in accordance with law, and under the law and the regulations the deductions claimed were legal and should not have been disallowed.

It will be seen that the question presented to this Court, though perhaps difficult of solution, is after all a very narrow question which can be simply stated: Is a mining corporation under the Corporation Excise Act of August 5, 1909, entitled, in the ascertainment of its net income to a deduction against gross proceeds from the mining and treatment of ores, to the extent of the ascertained purchase cost value of the ore in the ground before it was mined? We employ the expression "purchase cost value" rather than the term "value" in order at the outset to inform this Court that our claim for the refund of the taxes paid is limited strictly to the amounts which result from the application of the government regulations hereinafter explained and referred to.

What is claimed by us in this proceeding is that the plaintiff in error is entitled to deduct the *cost* of each ton of ore from the net realization therefrom in the calculation of net income, for the reason that the ton of ore was a part of the company's capital assets and is forever destroyed and its assets proportionately impaired to the extent of that ton of ore. In this contention we think it must be plain that we surely ask no more than what is reasonable. Our grievance is, that the plaintiff in error was not permitted any deduction whatever.

For the purposes of consideration of this case we here repeat in brief form for the convenience of the Court and counsel the precise figures upon which we make this contention: The taxes levied and paid were

for the years 1909 and 1910. The amended showing before the Commissioner of Internal Revenue was based upon the most careful calculations so that in these two years which constituted the hey-day of the company's prosperity the cost value of the ore mined in 1909 was \$3,770,374.68 leaving as net income under the Treasury rules and regulations in force \$765,380.02 so that the tax for that year should have been \$7,653.80 instead of \$41,890.91 which was paid. The cost value of the ores mined in the year 1910 was \$4,545,691.44 leaving as net income under the Treasury Department rules and regulations for the year 1910, \$428,459.97 so that the tax for that year should have been \$4,284.60 instead of \$49,681.02 which was paid.

Argument.

PRELIMINARY.

This proceeding involves an important question as to what deductions may be made by a mining corporation from its gross production in order to ascertain its net income within the meaning of the Corporation Excise Tax Law enacted August 5, 1909. In the interest of clearness and to avoid so far as possible confusion of thought in the solution of a complex question, we have thought it best to preface the formal points and authorities of the case by these preliminary remarks.

An examination of the few authorities bearing upon this question of depreciation will disclose the fact that before the Treasury Department had finally formulated its rules and regulations governing the assessment of the taxes against mining corporations and other corporations engaged in a business involving what is known as "wasting assets," corporations engaged in the business of mining metals, coal companies, oil producing companies, lumber companies and industries of that character conceived it to be obvious that the operations carried on by them necessarily involved the physical destruction of the capital assets upon which depended the life of the industries in which they were engaged. At first these companies took the position, in making returns under the Corporation Excise Act, that they were respectively entitled to a deduction equal to the value in the ground before it was mined of the ores, oils, and mineral contents, also of standing trees, etc., and that their income, if any, would be such profits or gains as could be shown over and above the value of capital assets thus used up. Thus many companies went so far in their claims for deductions as to urge that in the nature of things, there could be no profits or gains within the meaning of an income tax law for the reason that the only means of ascertaining the value of ore in the ground before it was mined, would be to calculate the difference between the gross realization therefrom and the costs of production. This

position, if it had been sustained, would of course have absolved these companies from the payment of any tax whatever. The only case which has reached the Supreme Court of the United States and has been determined by that Court was one in which the company relied strictly upon this position, and the Supreme Court declined to adopt such a sweeping view and therefore sustained the assessment which had been attacked; at the same time, however, that Court recognized that such a company is entitled to proper deductions for such depreciation in its capital assets, and three members of the Court believing that the company was entitled to the whole deduction claimed, dissented from the ruling made.

It is not our purpose in these preliminary remarks to analyze the decisions thus far rendered which we will show are in favor of the view herein expressed. But we desire to show in this part of our brief the growth and development of the ideas which at present obtain. The Treasury Department, after patient study of the economic aspects of the problem finally promulgated its regulations, which are hereinafter more fully set forth, and the theory adopted by the Treasury Department as embodied in the regulations upon the subject, made a distinction between gains from the sale of capital assets and commercial gains arising from skillful and efficient conduct of the business. In the ascertainment of gains from capital assets they adopted the rule of sub-

tracting from the gross realization from such sales, the purchase cost of the tons of ore, barrels of oil, or other units, making suitable allowance by addition or subtraction to represent increase or decrease of the value of these units prior to January 1, 1909, the date when the law retroactively took effect, and the Department in these regulations, with painstaking accuracy pointed out the mode by which the calculations should be made so that the deduction for this kind of depreciation would be represented by the resulting cost per ton multiplied by the number of tons extracted in any year.

We do not say that these regulations were necessarily the best possible solution of the difficult problem which faced the Department, but we do say that they were at least *more than fair* to the government and *less than fair* to the operator. These regulations have never been disapproved by any Court (unless the order sustaining the demurrer in the case at bar should be regarded as such disapproval), and we will show herein by the cases cited and discussed that the present condition of the law fully sustains our contention that we are entitled to the deductions claimed in our complaint.

Points and Authorities.

- I. THE CORPORATION EXCISE TAX LAW BEING SECTION 38 OF THE ACT APPROVED AUGUST 5, 1909, PURPORTS ONLY TO LEVY UPON A CORPORATION AN EXCISE TAX "EQUIVALENT TO ONE PER CENTUM UPON THE ENTIRE NET INCOME OVER AND ABOVE \$5,000, RECEIVED BY IT FROM ALL SOURCES DURING SUCH YEAR", AND THE ACT AS CONSTRUED PERMITS DEDUCTION FOR ORES EXHAUSTED IN MINING.

In the beginning and before the Treasury Department and the Courts had had time to rule and pass upon the Act in question, many corporations were of the opinion supported by very respectable authority that there was a clear distinction between what constitutes capital and what constitutes income, *Gray v. Darlington*, 15 Wall 63; 21 Law Ed. 45; and that the ore in a mine is merely a part of a company's capital assets.

Sargent Land Co. v. Von Baumbach, 207 Fed. 423;

Mitchell Bros. Co. v. Doyle, 225 Fed. 437.

It was upon this principle that the first cases coming to the attention of the Courts were based.

United States v. Nipissing Mines Co., 202 Fed. 803;

Stratton's Independence Ltd. v. Howbert, 207 Fed. 419;

Sargent Land Co. v. Von Baumbach, 207 Fed. 423.

In these cases it will be observed that the contending companies did not attempt to analyze accounts

so as to ascertain depreciations from exhaustion under the *cost* basis but stood strictly upon the proposition that the yield of a mine was necessarily from the sale of its capital assets and therefore not income, and it will be found that in the first and third of the cases cited, even that contention was sustained by the Courts. In the second of the cases, however, an opposite view was entertained and the Circuit Court of Appeals for the Eighth Circuit, when the case came to it on writ of error, certified to the Supreme Court of the United States certain questions involved.

Stratton's Independence Ltd. v. Howbert, 231
U. S. 399; 58 Law Ed. 285.

The United States Supreme Court in its determination of the correct answers to the questions so certified found itself limited by the record to the strict answer to the questions as certified and therefore found that the mining company was not entitled to deduct the whole net realization from ores as claimed by the company as the measure of the value of the ore in place. But the Court was careful to state in numerous parts of its opinion that it was driven to this conclusion by the condition of the record and the form of the questions submitted.

The Court said at page 421:

“It was of course contemplated that the income might be derived from the employment of property in business, and that this property might become more or less exhausted in the process; and because of this, a reasonable al-

lowance was to be made for depreciation if any."

Again, at page 417:

"Congress no doubt contemplated that such corporations amongst others, were doing business with a wasting capital, and for such waste they made due provision in declaring that from the gross income there should be deducted (inter alia) 'all losses actually sustained within the year,' including 'a reasonable allowance for depreciation of property, if any,' etc."

But the Court put the seal of its condemnation upon the claim to deduct the full net value in these words, at page 420:

"And so, an affirmative answer to the third question as propounded would be the same in effect as an affirmative answer to the first or the second. For it is a matter of little moment whether it is to be said (a) that mining corporations are not 'engaged in business' at all, or (b) that they are engaged in business, but the proceeds of ore mined are not income, or (c) that such proceeds are income, but that there must be allowed as depreciation *all that part of the proceeds which remains after paying the bare outlays of the business*. In either case mining corporations would be exempt from the tax."

And at the conclusion of the opinion, page 422, we find the following:

"It would therefore be improper for us at this time to enter into the question whether the clause, 'a reasonable allowance for depreciation of property, if any,' calls for an allowance on that account in making up the tax, where no depreciation is charged in practical bookkeep-

ing; or the question whether depreciation, when allowable, may properly be based upon the depletion of the ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term 'value of the ore in place' than the parties have put upon it, and to instruct the circuit court of appeals respecting a question about which instruction has not been requested, and concerning which it does not even appear that any issue is depending before that court."

From these excerpts and others which might be quoted it is plain that the Court has conceded that a depreciation allowance from exhaustion is proper if based upon a fair and reasonable basis, and all that the Court decided is that it would not do for a corporation to claim as deduction the whole net realization and thereby escape the payment of the tax. It is obvious that if the complaining corporation in that case had proceeded in the manner in which the plaintiff in error in the case at bar proceeded, the decision must necessarily have been in its favor, but having relied upon a claim to deduct the whole net yield, and the record coming before the Court in that form, the Court was obliged to deny the claim and had before it no means or data upon which to base a more favorable decision. It will be noted that Mr. Chief Justice White, Mr. Justice McKenna and Mr. Justice Holmes dissented from the answer to the third question, even in the face of the record as it was made.

Since the decision of the above mentioned cases there have been two more Court decisions to which we respectfully direct attention.

The case of *Von Baumbach v. Sargent Land Company* (207 Fed. 423), was affirmed by the Circuit Court of Appeals of the Eighth Circuit, 219 Fed. 31. In the course of the opinion by Circuit Judge Sanborn, we find the following:

“There are still other reasons than those which have been stated why the judgments below should not be reversed. If there were error in the conclusion that the receipts of the companies from their collections of the amounts of their claims against the lessees which came due in 1909, 1910 and 1911, for the purchase price of or the royalties on the ore were not included in their gross income, if they were a part of that gross income, then the companies would have been entitled to ‘a reasonable allowance for depreciation of property’ by the reduction of the values of their claims by these payments. *Stratton’s Independence Limited v. Howbert*, 231 U. S. 399, 418; 34 Sup. Ct. 136; 58 L. Ed. 285. And as the payments on these claims unavoidably reduced and depreciated their value, as has been shown, by the amounts paid, there would have been no net income from them on account of which an excise tax could have been lawfully exacted. *United States v. Nipissing Mines Co.* (D. C.), 202 Fed. 803, 805; *Stevens v. Hudson’s Bay Co.*, 101 L. T. Rep. 96, 97, 98.”

This is in strict harmony with what had been said by District Judge Willard in the original trial of the case, 207 Fed. 423, at page 430:

“I believe that the ordinary meaning attached to income, when it is not derived from personal

exertion, is that it is something produced by capital without impairing that capital, and which leaves the property intact, and that nothing can be called income, for the purpose of this act, which takes away from the property itself."

In *Mitchell Bros. Co. v. Doyle*, 225 Fed. 437, these principles were invoked by a lumber company which in computing its taxable net income for the years 1909 and 1910 and other years deducted from its gross receipts the then actual market value of the timber stumpage cut and converted into lumber during the respective years. After payment upon that basis the Commissioner of Internal Revenue had made an additional assessment for each year based upon the prices paid by the plaintiff in 1903 for its timber, lands and other property as shown upon its books. These additional excise taxes were paid under protest and suits brought to recover the amounts paid. It was shown that between 1903, the date of purchase and January 1, 1909, the date when the Excise Tax Law went into effect, these lands and the timber thereon had so increased in value that they were fully worth the amounts which had been originally deducted from the gross receipts as capital assets. The Court said:

"It cannot be denied that the plaintiff's standing timber was a part of its capital assets, and that the conversion of the timber into lumber and the sale of the lumber constituted at least an indirect sale of the timber, and so of capital assets. The mere change of the timber into lumber or money did not transform capital

into income. The miller who grinds his stock of wheat into flour and sells the flour does not thereby destroy or impair his capital and convert it into income. The same is true of the manufacturer who converts his cotton into cloth, the landowner who sells his lands for cash, the furniture maker who transforms lumber and other material into chairs and tables, the iron-maker who produces steel rails from iron ore, and every industrial institution where raw materials are converted into finished or other products or into money. In each instance, income is and must be something over and above the original capital investment plus the cost of production and sale. This rule has been uniformly recognized by the Commissioner of Internal Revenue in the decisions and directions issued from his office for the guidance of the collectors of corporation excise taxes and of the taxpayers themselves.

Standing timber is as staple a product as wheat, cotton, or iron. It is a tangible and visible property, whose quantity, quality, and market value can be readily ascertained and determined. In these respects it is wholly unlike mineral ores in place under ground. If plaintiff had sold its standing timber on the 1st day of January, 1909, at its market value, could it be claimed that any part of the proceeds of such sale constituted taxable income, because more was realized than the original cost in 1903? Certainly not, for the reason that the increase in value had accrued prior to the time when the Excise Tax Law became operative. If plaintiff had purchased its timber 30 years ago from the government at \$1.25 per acre, and had manufactured all of it into lumber and sold the lumber during the year 1909 at market prices which prevailed on the first day of that year, could it be claimed that the entire proceeds of the lumber above the trifling purchase

price of the timber and the cost of manufacture and sale constituted taxable net income? Can the government, at least in the absence of specific legislative declaration to that effect, reach back years before the enactment of its revenue statute for a controlling factor in determining the net income of a corporation? Can it ignore a substantial increase in value of property, which has occurred and accrued prior to the taking effect of the tax law, and thereby convert into income that which is not income within any meaning of the term? To state these questions is to answer them. *Gray v. Darlington*, 15 Wall. 63; 21 L. Ed. 45; *Bailey v. Railroad Co.*, 106 U. S. 109, 114, 115; 1 Sup. Ct. 62; 27 L. Ed. 81.

The rule of apportionment of the increment or increase of values between the years prior to January 1, 1909, and those subsequent to that time, which has been recognized and acted upon by the Commissioner of Internal Revenue, does not aid the government in this case, for the reason that the amounts deducted by plaintiff from its gross receipts as capital assets did not exceed the actual market value of its property upon January 1, 1909. It makes no difference whether such deduction was made nominally on account of depreciation of property or for restoration of capital.

Tested by another well-settled rule that the gain, profit, or income of a corporation is that which may be withdrawn or expended without reducing the value of its property or impairing its capital, the contentions of the government must fail. Every tree cut from the lands of plaintiff after January 1, 1909, and manufactured into lumber, cord-wood, or other products, and then sold, reduced its property and capital by the exact amount of the value of such standing tree, unless an equivalent portion of the proceeds of the sale was substituted therefor.

The government is not concerned with the gains made, profits earned, or income received, whatever their form, by the plaintiff prior to the time when its tax law became operative. Whether a valid retro-active law could be enacted need not be determined, because no attempt has been made to tax such gains, profits, or income."

We have thus liberally quoted from this case because we believe sincerely that the legal principles therein stated are both sound and conclusive of the case at bar. We further believe that every one of the principles therein stated are in precise harmony with the Supreme Court's decision in Stratton's Independence Limited, and that it is only by a misreading of the Stratton's Independence Limited case that a different conclusion could be reached. In all these cases the right to a deduction of such value as the ore or the timber respectively had when the law went into effect January 1, 1909, are clearly recognized and the only reason why the Supreme Court could not grant relief to the complainant in the Stratton's Independence Limited case was because that particular plaintiff had made and flatly stood upon and persisted in an unwarranted and unjustifiable demand that it should be relieved from taxation altogether. All that was decided by the Court, as already stated (and for this reiteration we humbly apologize) was that it was unjustifiable to treat the whole net realization as the precise measure of the value of the ore in place. There was no question before that Court of what

would be the effect of compliance with the Treasury Department regulations hereinafter referred to; there was no attempt on the part of the complaining company in that case to comply with any Department regulations for the ascertainment of the cost value. That Court was therefore, as stated in its opinion, not called upon to pass upon

“The question whether depreciation, when allowable, may properly be based upon the depletion of ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term ‘value of the ore in place’ than the parties have put upon it, and to instruct the Circuit Court of Appeals respecting a question about which instruction has not been requested, and concerning which it does not even appear that any issue is depending before that Court.”

It is for this reason that we strenuously urge that this case is not governed at all by the ruling in the Stratton's Independence Limited case. The Honorable District Court did, however, sustain the demurrer herein upon the authority of that case (Transcript, page 23) but we respectfully maintain that this conclusion must have sprung from a misconception of the situation involved therein.

II. THE TREASURY DEPARTMENT REGULATIONS WERE REASONABLE AND LAWFUL; THE PLAINTIFF IN ERROR COMPLIED THEREWITH AND IS THEREFORE ENTITLED TO THE DEDUCTIONS CLAIMED AND TO REVERSAL OF THE JUDGMENT ACCORDINGLY.

Upon the authority of all these cases above cited, we deem it clearly to be established that the plain-

tiff in error herein was entitled to recover the bulk of the tax paid upon some proper basis of depreciation for exhaustion of capital assets. The only remaining question as it seems to us, is, what is the true basis of allowance for depreciation of ore bodies in a mine?

This brings us to a consideration of the regulations of the United States Treasury Department to which Department is confided by law the administration of the Act under discussion.

The first regulation upon the subject was promulgated December 3, 1909, and employed very general language. It is as follows:

“DEPRECIATION—The deduction for depreciation should be the estimated amount of the loss, accrued during the year to which the return relates, in the value of the property in respect of which such deduction is claimed that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put, and which loss has not been made good by payments for ordinary maintenance and repairs deducted under the heading of expenses of maintenance and operation or in the ascertainment of gross income. This estimate should be formed upon the assumed life of the property, its cost value, and its use.”

Then followed the regulations of February 14, 1911, known as T. D. 1675, in which the Department, after long study, aimed to reach a solution of this question which would be fair to the government and to the mining companies. We will cause to be printed an appendix to this brief containing the

part of the regulations applicable to the question under discussion, being Sections 80-89 inclusive, and in our brief we will attempt only to set out the plan thereof in substance.

The Regulations, Sections 80 to 89 inclusive, relate to depreciation of minerals, oils, etc.: they divided gains and profits of business involving wasting assets into two classes (a) gains from sale of capital assets and (b) commercial gain from skillful and efficient conduct of the business; they base the scheme of ascertainment of *net* income in such business primarily upon the "original capital investment cost" making suitable addition for increase of value prior to January 1, 1909, when the law took effect retroactively, this element being regarded as "unearned increment"; they then provide for the estimation as of January 1, 1909, of the number of tons, barrels or other units contained in the mine or deposit and using this as the division factor find from the original capital cost, the cost per unit for depreciation purposes; then the deduction for the year equals the unit cost per ton (in the case of minerals) multiplied by the number of tons extracted.

We respectfully urge that the scheme thus adopted by the department was eminently fair to the government, for it assured to the government the receipt of taxes whenever in any year a mining company produced any ore which yielded anything over its initial cost per ton. It mattered not if a

company never got back even a fair percentage of its original capital expenditure; while it produced it was bound to pay. Whatever unfairness there may have been in the plan was borne by the company and not the government. The company had at all-times to assume the risk, the rule being, pay as you go. Furthermore the most that the company could in any case claim for depreciation during its whole existing life was the cost value as of January 1, 1909, which constituted its depreciation limit.

Not only was the scheme thus devised by the Treasury Department eminently fair to the government but it was in complete harmony with the conclusions of the Court reached in the decision of the case of *Mitchell Bros. Co. v. Doyle*, 225 Fed. 437, hereinbefore cited and quoted at considerable length.

III. DEPARTMENT REGULATIONS ARE PRESUMPTIVELY CORRECT AND LEGAL.

We submit that when Congress confides the ascertainment of a "reasonable allowance for depreciation of property" to an executive department of the government, and that executive department solemnly adopts and promulgates rules and regulations which are eminently fair to the government and only questionably fair to the taxpayer; when the mining corporation in good faith enters into an exhaustive study and prolonged effort to comply

not only with such rules and regulations, but with any and every additional requirement reasonable or unreasonable imposed upon it as additional conditions by such executive department, as for example the condition that in order to obtain consideration it must show in its books and in its annual statements to stockholders the resulting impairment of its capital assets (as shown by our complaint); then we say, the taxpaying corporation is entitled at the hands of a Court to the usual presumption that the officers of the department in question have correctly construed the law and that such construction is as reasonably favorable to the government as the circumstances justify.

U. S. v. Cerecedo Hermanos, 209 U. S. 338;
52 L. Ed. 821;

Jacobs v. Prichard, 223 U. S. 200; 56 L. Ed.
405;

U. S. v. Hammers, 221 U. S. 220; 55 L. Ed.
710.

We feel sure that Congress did not intend by the term "net income" to tax a company which makes a loss instead of a profit.

IV. THE REGULATIONS PROVIDE A FAIR MEASURE OF DEPRECIATION FROM EXHAUSTION; ARE HARMONIOUS WITH AND NOT REPUGNANT TO THE ACT.

We ask the Court to bear in mind that what the Statute speaks of is "depreciation of property" and not depreciation of *value* as reflected in the fluctuat-

ing stock markets for shares. It might be true as suggested by the Court in the original trial of the Stratton's Independence Limited case that in an undeveloped property, market value may be increased rather than decreased by discoveries of new ore deposits in the very act of mining known deposits, but this circumstance only enhances the market value and does not in any logical sense decrease the actual depreciation in the property itself to the extent of the ores being mined. We deem it fortunate indeed that our client, plaintiff in error herein, chose to rely upon literal and complete compliance with the department regulations, for this circumstance entitles us to ask at the hands of this Court a reversal of the decision of the District Court, unless this Court shall find that the regulations themselves are in some way repugnant to the Act of Congress. We believe that a careful consideration of the regulations found in the appendix hereto will convince this Honorable Court that the rules and regulations of the Treasury Department are well calculated to bring into the United States Treasury an even larger proportion of mine products than was intended by the framers of the Act, and as large a proportion of the mine product as comports with justice and fair treatment in a property, the very nature of which causes it at all times to be traveling toward its grave. In view of the fact that three of the Judges of the Supreme Court were of the opinion that the whole net value of ore proceeds

is a proper basis of depreciation, we fell assured that at least a majority of that Court would have concurred in the view that the cost value as provided by the Department rules are clearly deductible, and that is all that we contend for in the case at bar.

If there ever had been any doubt as to the reasonableness and fairness of the Treasury Department Regulations touching the matters herein discussed, such doubt has been finally removed by the new Act of Congress just approved, wherein the original regulation hereinbefore quoted has been specifically adopted and the later regulations found in the appendix to this brief have been applied with even more liberality in the new law than under the regulations themselves. The language of the new Act (in effect Sept. 9, 1916) is found in the Second Subdivision of Section 12, of the new Income Tax Act (page 40, Conference Committee Print, H. R. 16763). It reads as follows (being part of the allowed deductions):

“All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use of employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the

mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, Nineteen Hundred and Thirteen, the fair market value as of that date, no further allowance shall be made. * * *"

It will be seen from the language of the law just enacted that the Congress itself has thus legalized the deductions for depreciations from exhaustion of ore bodies even to a more liberal extent than was provided by the rules and regulations which were complied with by this plaintiff in error, and which had been promulgated under a plenary grant of power to the Treasury Department by the terms of the original Act.

We regret the length of this brief and wish to assure the Court that if it had seemed possible by a shorter method of treatment of the subjects discussed to have presented the argument adequately, we would have done so. We respectfully submit that the complaint of the plaintiff in error *does* state facts sufficient to constitute causes of action and that the defendant's demurrer should have been overruled; that the Court erred in sustaining the demurrer as to each of the causes of action stated therein and that the Court erred in dismissing the said cause and giving judgment of dismissal.

Wherefore we ask that the decision of the District Court be reversed and the cause be remanded for further proceedings.

Respectfully submitted,

HOYT, GIBBONS & FRENCH,

ALLEN G. WRIGHT,

Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX

(Being Reprint of Sections 80 to 89, Inclusive, of the Regulations of the Treasury Department, Dated February 14, 1911, and Being Known Among the Printed Documents of the Treasury Department as T. D. 1675).

DEPRECIATION IN MINERALS, OILS, ETC.

80. In case of corporations whose business consists in part or wholly of mining, producing, and disposing of deposits of nature (ores, coals, gas, petroleum, and sundry minerals) the conduct of such business will be understood to comprehend two classes of gains or losses, viz:

(a) The gain or loss resulting from the sale of capital assets, i. e., either the increment, or the loss, arising through possessing over a period of time the investment in the same.

(b) The trading or commercial gain attached to the conduct of the industry, the employment of working capital, the effort and risk involved.

81. In the ascertainment of net income deduction will be allowed for depreciation arising from exhaustion of deposits of ore, mineral, etc., and for depreciation and obsolescence of improvements, in accordance with general regulations respecting depreciation allowances, on the basis of the original capital investment cost of the properties concerned to the company reporting.

82. A further deduction will also be allowed, through not including the same at all in the item

of gross income (item 3, Form 637), for the unearned increment represented in such properties as at January 1, 1909, which will be determined in general as follows:

83. An estimate should be made as of January 1, 1909, of the fair market value at that date of the minerals, etc., in deposit. This estimate should be formed on the basis of the disposal value of the minerals in total and exclusive of value of improvements and development work. This valuation should also be reduced to a unit value—per ton, barrel, etc.

Note—Values as aforesaid should not be estimated on the basis of the assumed salable value of the output under current operative conditions, less the actual cost of production, because as hereinbefore stated, the selling price under such conditions comprehends a profit both for carrying the investment in minerals, improvements, and working capital, and for conducting operations in respect of production and disposal of product. The value to be determined as stated must be on the basis of the salable value of the entire deposit of the aggregate units of minerals considered en bloc if disposed of in that form. Nor must such valuation comprehend any speculative value which might attach to a sale of the minerals en bloc, i. e., a value which might be obtained on the ground that the future would develop a much greater reserve of mineral deposits than were believed to exist at the time estimate as of January 1, 1909, was formed.

Any value of this latter character would attach obviously to such additional reserves when developed in future.

84. The unit value as of January 1, 1909, ascertained as above outlined, would indicate the value to be attached at that date to the capital assets disposed of during any calendar year succeeding, and should be used in determining the unearned increment at January 1, 1909, which may be excluded entirely from the item of gross income, as before explained, in following manner, viz:

Value at January 1, 1909, determined in manner outlined, of minerals, etc., which may be removed and disposed of in any year subsequent thereto.....	\$-----
--	---------

Less the following:

- | | |
|--|---------|
| (a) Proportion of depreciation charge applying to exhaustion of minerals disposed of, ascertained as first explained herein on basis of original cost..... | \$----- |
| (b) Royalty paid, if any on minerals disposed of..... | ----- |
| Balance, being unearned increment at January 1, 1909, to be excluded from gross income item..... | ----- |

85. The precise detailed manner in which the estimate of value of minerals, etc., as at January 1, 1909, shall be formed, must naturally be determined upon by each corporation interested, but formal record of such estimates, together with all sustaining information, should be carefully filed so as to be readily accessible for reference. Values as stated, as determined at January 1, 1909, should be used in compilation in all subsequent years' excise-

tax returns. The question as to whether it subsequently develops the property possessed a greater quantity of mineral, etc., reserve than was in the aggregate estimated as of January 1, 1909, is immaterial. Any excess which may be developed will be considered as possessing the same value at January 1, 1909, as that which then may have been known to be in the property.

86. Each excise-tax return (Form 637) should be accompanied with memorandum setting forth the extent in amount of the exclusion made from the item gross income for unearned increment realized during the year, as above outlined.

87. As the amount to be deducted for depreciation (paragraph 2 preceding) is to be formed on basis of the estimated reserve of minerals, etc., it follows that if it develops such estimate is understated, the cost investment in the capital asset may be wholly extinguished before all mineral reserves are removed. When this is reached, further deductions for exhaustion of minerals should be discontinued but in such event it will be noted, the allowance for unearned increment which is to be excluded entirely from gross income will be correspondingly increased.

88. In case of corporations leasing mines and paying royalties on minerals, etc., removed, the royalties paid are to be treated as expenses and deducted in ascertaining net income, as provided in general regulations. Any leasehold investment which the operating corporations may have in such

properties, either through a payment originally made for acquirement thereof or for improvements made upon the property, to be accounted for in accordance with regulations governing depreciation allowances and disposition of capital assets.

89. In respect to properties of the character in question which may be acquired by a corporation after January 1, 1909, a deduction will be allowed only as to depreciation arising from exhaustion based on original cost; no exclusion from gross income can be made for unearned increment, as profit arising in sale of such capital assets applies wholly to the period subsequent to January 1, 1909.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a corporation,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, as Collector of In-
ternal Revenue, Fourth California
District,
Defendant in Error.

**POINTS AND AUTHORITIES FOR
DEFENDANT IN ERROR**

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Assistant U. S. Attorney,
Attorneys for Defendant in Error.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2777

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE GOLDFIELD CONSOLIDATED MINES
COMPANY, a corporation,
Plaintiff in Error,

VS.

JOSEPH J. SCOTT, as Collector of In-
ternal Revenue, Fourth California
District,
Defendant in Error.

POINTS AND AUTHORITIES FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

This is a Writ of Error from the Judgment of the District Court in an action against the Collector of Internal Revenue for the recovery of corporation excise taxes alleged to have been collected illegally and under protest for the years 1909 and 1910, under the Act approved August 5, 1909, in which the District Court sustained a general demurrer to each of the two counts of the complaint.

There are two counts in the complaint, one for each of the years mentioned, and the points involved

in each count are the same, with the exception that paragraph X of the second count, in addition to the statement of facts set forth in the first count, contains the further allegation that the tax for the year 1910 was assessed after the time for legally assessing said tax had expired.

ARGUMENT

I.

The Assessment for the Year 1910 Was Made in Time.

The fifth paragraph of Section 38 of the Act provides as follows:

“The assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable, on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment.”

In view of the foregoing, it is clear that the Collector could have made an assessment after June 1, 1911, and that his right thereto continued under certain conditions for a period of three years.

Paragraph VII of the second count of the complaint herein shows that the plaintiff made an amended return and that it was given until the 28th day of January, 1912, within which to do so. The complaint therefore shows upon its face that the first return made was not satisfactory and the Court will not be justified in determining from the complaint that the assessment complained of was made subsequent to the time when it could legally have been made.

See National Bank v. Allen, 223 Fed. 472, 478

In all other matters the points raised in the demurrer apply equally to each count and the argument of defendant in error will be addressed to the first count, it being understood that the points raised shall apply to each count.

II.

Neither Count of the Complaint States a Cause of Action.

In the first count the plaintiff asks for the recovery of \$41,890.91 alleged to have been paid under protest, tax on a net income for the year 1909 of \$4,189,091.61, the tax being calculated at the rate of one per cent thereupon. The plaintiff claims the right to a deduction against this income

as assessed for the item of depreciation for the year 1909 of the value in the ground before it was mined of 230,463 tons of ore of the value in place of \$5,646,940.46. If such a deduction were allowed, it is apparent that there would be no annual income for the year 1909 subject to a tax.

The contention of the defendant is that the plaintiff is not entitled to the deduction claimed and that the complaint does not lay a foundation for any deduction from the amount assessed or for any refund from the amount taxed.

Section 38 of the Act of August 5, 1909, provides, among other things, that in determining the net income of a corporation of the class to which plaintiff belongs, there shall be deducted "all losses actually sustained within the year and not compensated by insurance, or otherwise, including a reasonable allowance for depreciation of property, if any." The law of the case is very clearly laid down in *Stratton's Independence, Limited, vs. F. W. Howbert*, Collector of Internal Revenue, 207 Fed. 419, decided in the District Court of Colorado on September 3, 1912.

In that case the plaintiff claimed a deduction equal to the value of the ore in place before it was mined of all the ore mined during the year for which the assessment was levied, and the Court said:

"As to what is meant by the words 'net income' the relevancy of this results, of course, from the fact that the statute imposes an excise

tax of 1 per cent on such net income. Does 'net income' as thus used contemplate an allowance in favor of the company for ore in place extracted from the property or is it to be determined without such allowance? According to ordinary understanding it is undoubtedly true that in the operation of such corporations the ore extracted is not deemed an element to be reckoned with in determining the net income. In popular sense the net income of mining properties is the value of what is extracted after deducting the cost of extraction and treatment, and the cost of administering the company which may be conducting the operations, and finally after a reasonable reservation for contingencies. This is true not only as a matter of general understanding, but has been held uniformly by the courts to be a proper rule in determining whether or not a dividend is declarable by such companies. The doctrine as deduced from *People vs. Roberts* (156 N. Y. 585), *Morawetz on Private Corporations*, Sec. 442, and other authorities, is that the net income of a mining property for the purposes of dividends does not take into account so-called waste of the property by reason of the extraction of ore in place, but that such is to be determined by a comparison of the proceeds of the company, after a deduction for operation, expenses of the company, and such reasonable contingencies as may in the light of experience be expected. The following English cases, cited by the United States Attorney, are in point upon this: *The King vs. Atwood* (30 Revised Reports, 322); *Lee vs. Neuchatel Asphalte Co.* (41 Chancery Div., p. 1); *Coltress Iron Co. vs. Black*, assessor (6th Appealed Cases, p. 316); *Wilmer vs. McNamara & Co. (Ltd.)* (1805, Second Chancery, p. 245).

If, therefore, the net income is not affected for the purposes of dividends by the amount of

ore extracted, neither should it be affected by that circumstance for the purpose of an excise tax. We conclude, therefore, that the words 'net income' do not carry with them any contemplation of law that there shall be such a deduction as plaintiffs here claim."

And

"The ordinary definition of depreciation is the lessening of value. As applied to mining properties, the word carries with it, as in the case of any other business, the idea of deterioration in visible improvements, such as mills and other surface structures and perhaps the underground improvements, so far as they are put in by the hand of man, and, therefore, speaking popularly, when we think of depreciation in mining properties we think of a lessening in value by time, or perhaps by accident, of those physical elements which go to develop and to improve the property. How does this meaning, commonly entertained and accepted and which is common to every class of corporations, become enlarged in case of mining companies, so as to make the extraction of ore likewise an element of depreciation? The Court's view is that it does not. This conclusion is in part induced by the reasons which have been above discussed in connection with the term 'net income' and in part by the peculiar nature of the mining business. This latter is *sui generis*. It lives by dying. It is a business that is intrinsically uncertain. The segregation of part of a stock of goods is a definite deduction from the whole. The excavation of a body of ore, however, may reveal other bodies and result in immeasurable increment. The taking out of ore, while in a sense depreciation from the body, very often leads to the revealing of still larger bodies, and thus results not in a lessening of the value of the claims, but in a

great increase in such value. Mining excavation, when properly conducted, is very often more a development than a waste or a detraction. As applied to this class of corporation, having as its purpose to exhaust—it may be a year hence or a hundred years hence—the body of ore for profit, the mere fact that ore may be extracted does not, in my judgment, make the value of such ore an element to be classed and deducted as a depreciation of the property. The Court, therefore, holds as to this second provision of the statute that the extraction of ore does not constitute a credit in favor of mining companies upon the account between them and the Government when this excise tax is to be assessed.”

That case subsequently went to the Supreme Court of the United States upon questions certified to the Supreme Court by the Circuit Court of Appeals for the Eighth Circuit and was reported 239 United States Reports, p. 399; 58 L. Ed. 285. The three questions certified were as follows:

“I. Does par. 38 of the Act of Congress entitled, ‘An Act to Provide Revenue, Equalize Duties, and Encourage the Industries,’ approved August 5, 1909 (36 Stat. at p. 11, Chap. 6, U. S. Comp. Stat. Supp. 1911, p. 741), apply to mining corporations?

II. Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the aforementioned Act of Congress?

III. If the proceeds from ore sales are to be treated as income, is such a corporation entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of par. 38 of said Act of Congress?”

The United States Supreme Court answered the first and second questions in the affirmative and the third question in the negative.

The Court, after carefully considering the issues raised by the questions submitted, said:

“It is at the same time obvious that any method of stating the account that excludes all element of gain from the process of mining must, through one process or another, exempt mining companies from liability to tax under the Act of 1909 with respect to their mining operations. And so, an affirmative answer to the third question as propounded would be the same in effect as an affirmative answer to the first or the second. For it is a matter of little or no moment whether it is to be said (a) that mining corporations are not ‘engaged in business’ at all, or (b) that they are engaged in business, but the proceeds of ore mined are not income, or (c) that such proceeds are income, but that there must be allowed as depreciation all that part of the proceeds which remains after paying the bare outlays of the business. In either case mining corporations would be exempt from the tax.

In our opinion, there are at least two insuperable obstacles in the way of returning an affirmative answer to the third question as certified.

In the first place, it is fallacious to say that, whatever may have been the original cost of a mining property or the cost of developing it, if in fact it afterwards yields ores aggregating many times its original cost or market value, this result merely proves and at the same time measures the intrinsic value that existed from the beginning. We are here seeking the correct

interpretation and construction of an act of legislation that was, at least, designed to furnish a practicable mode of raising revenue for the support of the government, and to do this in part by imposing annual taxes upon corporations organized for profit, and by measuring the amount of the contribution to be required from each corporation according to its annual income. The Act deals with corporations engaged in actual business transactions, and presumably conducted according to ordinary business principles. It was, of course, contemplated that the income might be derived from the employment of property in business, and that this property might become more or less exhausted in the process; and because of this, a reasonable allowance was to be made for depreciation of it, if any. But plainly, we think, the valuation of the property and the amount of the depreciation were to be determined not upon the basis of latent and occult intrinsic values, but upon considerations that affect market value and have their influence upon men of affairs charged with the management of the business and accounting of corporations that are organized for profit and are engaged in business for purposes of profit."

It is true that the Supreme Court made certain comments in its decision by which it limited the decision strictly to the issues raised by the questions as certified under paragraph 239 of the Judicial Code. We submit, however, that there is nothing in the case which conflicts with the contentions of the defendant here and that the net result of the law as laid down by the District Judge and the United States Supreme Court, constitutes a determination of the highest courts which have

passed upon this question in favor of the defendant here.

The only other case counsel has been able to find bearing upon this point is that of *United States vs. Nipissing Mines Company*, reported in 202 Fed. at page 803 and following. That case, however, did not have to do with the issues presented here. The whole question there was whether or not a deduction should be allowed for depreciation which was not entered in the books of the company as depreciation for the year and the further question as to the reasonableness of value fixed upon the ore in place. The point was not raised that the value of depletion in ore was not a proper item of deduction. This was perhaps due to the fact that the Treasury Department at the time that case was tried was allowing through an erroneous construction of the statute, deductions for depreciation upon that basis.

In view of the fact that in the Nipissing case the very contention which we deny here was admitted, it cannot be taken as the law of this case and should carry no weight in the decision of this case.

The cases of *Von Baumbach vs. Sargent Land Company*, 207 Fed. 423, and 219 Fed. 31, and *Mitchell Bros. Co. vs. Doyle*, 225 Fed. 437, cited by counsel for plaintiff in error, in his brief, are not in conflict with the foregoing contention of defendant in error.

Counsel for plaintiff in error made the point that the rules and regulations of the Treasury Department at the time this assessment was made, provided for a deduction such as is claimed here. Our answer to that point is that no rule of any department of the Government can alter or vary a statute, and the sole question before the Court here is the interpretation of the statute as enacted by Congress.

The judgment of the Court below should be sustained with regard to each count.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Assistant U. S. Attorney,

Attorneys for Defendant in Error.

No. 2784

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TSUIE SHEE et al.,	} <i>Appellants,</i>
VS.	
SAMUEL W. BACKUS, as Commissioner, etc.,	
	<i>Appellee.</i>

BRIEF FOR APPELLANT.

JOSEPH P. FALLON,
Attorney for Appellant.

Filed

APR 13 1917

Filed this.....*day of April, 1917.*

F. D. Monckton
Clerk

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TSUIE SHEE et al.,

Appellants,

vs.

SAMUEL W. BACKUS,

as Commissioner, etc.,

Appellee.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from an order denying a petition for a writ of habeas corpus in the District Court.

The appellant is a Chinese woman who made application to be admitted to the United States, on the 6th day of May, 1914, at the port of San Francisco, as the wife of a native born Chinese citizen of the United States: and was denied the right to enter the United States by the immigration officials on the ground that the relationship of wife to the said citizen had not been properly established to the satisfaction of said officials.

From the excluding decision the appellant's husband sued out a writ of habeas corpus in the United States District Court in and for the Northern District of California, and the said Court issued the writ of habeas corpus on the ground that the proper official action had not been taken by the Department of Labor; the Court making the writ temporary pending a review of the record in the case by the proper official of the Department of Labor. Upon showing made subsequently thereto that further action had been taken by the Department of Labor and which action satisfied the lower Court that the proper official had reviewed the record the Court ordered the writ discharged.

The appellant and child were released under bond pending the determination of the matter in the Courts; and subsequently thereto another child was born of the alleged union, and the couple now have two children; all of the family are now at large under bond pending the determination of this appeal.

Specification of Errors.

1. That the hearing accorded the detained was unfair in this that there was not an honest effort made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

2. That the action of the immigration officials in searching the baggage of appellant's husband, without his consent, was a violation of Article IV in

Amendment of the Constitution of the United States.

3. That the withholding of certain letters and documents, containing new evidence and which were used on appeal, from the inspection of appellant and her attorney is a violation of Rule No. 5 (B) of the Rules governing the admission of Chinese.

4. That when the case was up for final hearing before the Secretary of Labor the appellant's counsel was not notified of said hearing and was given no opportunity to refute the charges contained in the new evidence submitted on the appeal.

Argument.

It would perhaps be proper to quote from the decisions of the Courts and endeavor to ascertain just what the law is in respect to these matters.

“A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the Inspector, or other executive officers, are indispensable to the lawful deportation of an alien.

Where, by abuse of the discretion or the arbitrary action of the Inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the Courts of the United States to issue a writ of habeas corpus.

The Japanese Immigrant case 189. U. S. 86, 1001, 101, 23 Sup. Ct. 611, 47 L. Ed. 721; Chin

Yow v. United States, 208 U. S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 1165; *Ex parte Pet Kos* (D. C.) 212 Fed. 275; *United States v. Chin Lew*, 187 Fed. 544, 109 C. C. A. 10; *United States v. Williams* (D. C.) 185 Fed. 598, 604; *U. S. v. Williams* (D. C.) 193 Fed. 228, 231.

An alien as well as a citizen, is protected by the prohibition of deprivation of life, liberty, or property without due process and equal protection of the law. This principle is universal. It applies 'to all persons within the territorial jurisdiction of the United States without regard to any differences of race, of color, or of nationality.' "

Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064; 31 L. Ed. 220;

U. S. Rev. St., Section 1977 (2 Comp. Stat. 1913, Section 3925).

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

In re Rosser, 101 Fed. 562, 567; C. C. A., 497; *United States v. Sibray (cc)*, 178 Fed. 144, 149.

That is not a fair hearing in which certain papers are seized and certain anonymous communications are received and never submitted for denial or refutation by the detained.

"While Congress has power to commit to executive officers the enforcement of the laws

and regulations relating to the admission and exclusion of aliens, and declare that the conclusions of such officers in determining the right of an alien to enter shall be conclusive, a deportation order may be invalid, and the alien entitled to his discharge on habeas corpus, if it is unsupported by any evidence, or is the result of errors of law.’’

U. S. v. Williams, 200 Fed. 538.

For the purpose of determining the question of whether the appellant was accorded a fair hearing we will consider the circumstances surrounding and under which the hearing was held.

At the time the hearing before the immigration service was held, in addition to the testimony of certain witnesses there were certain papers transmitted on appeal to the Washington office of the Department of Labor which contained new evidence, and which were never submitted to appellant or her attorney.

Rule 5, subdivision “B” of the rules governing the admission of Chinese provides as follows:

“Applicant’s counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein * * * The word ‘record’ as used in this paragraph shall not be construed to include memoranda of comment of letters of transmittal unless they contain evidence additional to that in the record proper.”

The exhibits mentioned in the letters of transmittal claimed by the appellee to be privileged com-

munications, were withheld from appellant and her attorney and no inspection, comment or refutation was permitted. The letters of transmittal did contain matters of evidence against appellant and it is particularly set forth in the petition for a writ of habeas corpus in the record herein.

A re-examination was requested by appellant and no doubt if said examination had been granted would have resulted in the submission of additional evidence on behalf of appellant and her child which would have resulted in the appeal having been sustained by the Secretary of Labor; the refusal to permit the appellant to be re-examined was an abuse of discretion, and it was an unwarranted, arbitrary action of the immigration officials to refuse to conduct the re-examination as requested.

These papers were never a part of the certified record of the Department of Labor in the case of appellant and the transmitting of the said letters referred to in the petition contained in Exhibit "B" contemporaneously with the record of appellant and her child, and referring in the letter of transmittal to other cases, and asking that they be considered together, was an incorporation of said matters of evidence in the record against the said appellant and her child without giving them an opportunity to inspect the same, or make answer thereto, and such action was therefore arbitrary, and resulted in prejudice, unfairness and deprived the appellant of a fair hearing.

Appellant was represented by an attorney at Washington, D. C., when the record was placed before the Secretary of Labor for his final consideration, but said attorney was not granted an opportunity to appear and present the case as is more fully set forth in the Traverse to Return and Traverse to Supplemental Return, which is a part of the record and particularly referred to.

That cannot be considered a full and fair hearing that permits evidence to be introduced and considered by officials in a distant city without granting the applicant the opportunity to inspect the same; and which prevents the applicant from making any defense thereto.

It is patent that the purpose of the aforesaid Rule "B" was to obviate such a situation, and it indicates that an honest effort was not made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

Another indication of the unfairness manifested by the immigration officials was the seizure of the appellant's husband's books, documents and papers without his consent and against his protest as is more fully set out in the Traverse to the Return and Traverse to Supplemental Return.

Because the hearing accorded the appellant was unfair in this that there was not an honest effort made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law we respectfully request that the order of the

District Court denying the issuance of a writ of habeas corpus be reversed and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco,
April 12, 1917.

JOSEPH P. FALLON,
Attorney for Appellant.

No. 2784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TSUIE SHIE et al,

Appellants,

vs.

SAMUEL W. BACKUS,
as Commissioner, etc.,

Appellee.

BRIEF OF APPELLEE

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed

Filed this.....day of April, 1917.

MAY 1 - 1917

FRANK D. MONCKTON, Clerk

F. D. Monckton

Clerk

By....., Deputy Clerk.

No. 2784.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TSUIE SHEE et al,

Appellants,

vs.

SAMUEL W. BACKUS,
as Commissioner, etc.,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellants, Tsuie Shee and Quan You, made an application to enter the United States as the wife and son respectively, of a native. After the application was made, an anonymous letter was received by the Immigration officials to the effect that applicants were not the wife and son respectively of the alleged husband and father, whose name is Quan Wy Chung. A thorough investigation was made in the case and the application to land refused, and applicants ordered deported.

A petition for a writ of habeas corpus was then filed on behalf of the applicants, to which a return was filed on behalf of the government. At the hearing before the lower court, it appeared that when the matter was presented to the Secretary of Labor upon appeal, it was not determined by the Secretary or the assistant Secretary as required by law, and said applicants were permitted to land upon giving a bond in the sum of \$1500 conditioned that they would surrender themselves again to the Immigration officials when their appeal was properly determined, providing the decision upon said appeal be adverse to their rights to land.

In pursuance to this decision, the whole record of the Immigration Bureau which contained all of the evidence presented in determining the said application, was again presented to the Secretary of Labor, and determined by the proper officials, and said applicants again ordered deported.

Following this order of deportation by the Secretary of Labor, the lower court was again appealed to for the dismissal of said applicants, but Judge Dooling in a decision found on page 100 of the Transcript of Record, held adversely to said applicants, and they were ordered to surrender themselves to the Immigration officials for deportation, and their discharge on habeas corpus was denied. It is from this decision that this appeal was taken.

ASSIGNMENTS OF ERROR.

Counsel representing appellants has set forth on pages 2 and 3 of his brief, the following assignments of error:

1. That the hearing accorded the detained was unfair in this that there was not an honest effort made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

2. That the action of the immigration officials in searching the baggage of appellant's husband, without his consent, was a violation of Article IV in Amendment of the Constitution of the United States.

3. That the withholding of certain letters and documents, containing new evidence and which were used on appeal, from the inspection of appellant and her attorney is a violation of Rule No. 5 (B) of the Rules governing the admission of Chinese.

4. That when the case was up for final hearing before the Secretary of Labor the appellant's counsel was not notified of said hearing and was given no opportunity to refute the charges contained in the new evidence submitted on the appeal.

ARGUMENT.

In his argument, counsel seems to lay particular stress upon the unfairness shown by the Immigration officials in the hearing of the various matters

presented in determining appellants' case. In order to get a thorough understanding of the evidence submitted in this case, it is necessary to call attention to the report of J. H. McCall, found at page 25 of the original record of the Bureau of Immigration marked Exhibit "A". This report calls attention to the various discrepancies which appeared during the examination of said applicants and other witnesses concerned.

The report of John Endicott Gardner, Chinese Inspector and Interpreter, beginning on page 108 and ending on page 94 of said original record of the Bureau of Immigration marked Exhibit "A", sets forth very clearly the evidence considered by the Immigration officials in determining the present case. This report is as follows:

San Francisco, Cal.,
May 29, 1914.

Commissioner of Immigration,
Through Chinese Inspector in Charge,
Port of San Francisco.

In re Tsui Shee, Wife of Native, 13406/7-2
and Quan You, Son of Native, 13406/7-3
("Mongolia" May 6th, 1914.)

With reference to the above entitled cases, I have the honor to report that the investigation of them was first conducted by Inspector McCall. Said investigation developed numerous discrepancies, on which alone he reported

adversely. Just as he was about to take up these cases, and while the alleged husband, Quan Wy Chung, alias Quan Choey Quock, was still at this Station, Inspector McCall considered it prudent to search the baggage of the alleged husband, as the result of which much incriminating evidence was found.

This evidence consisted of coaching papers; memorandum books containing accounts bearing on his efforts to aid and abet the illegal landing of many Chinese in conjunction with Jew Loy Sing, alias Jew Tsz Sik, a notorious steerer and highbinder up to his death at the hands of other highbinders while under indictment by the United States Grand Jury for tampering with court records; addresses of notorious prostitutes; accounts with such prostitutes; a quitclaim on one of the prostitutes who evidently became his paramour; and such like documents.

All of these were found by Inspector McCall in the possession of said alleged husband. I have gone carefully over these books, papers and so forth, and I have no hesitation in stating that they show the alleged husband to be a long time steerer—a man of despicable character; and from the discrepancies in the testimony of his alleged wife's case, and the coaching papers, he is now engaged in an attempt to import one more Chinese woman.

The child in the case is but a mere incident; brought in evidently merely to give the case the look of respectability. In a country like China, where there is such poverty all the time, and

starvation, children can be easily gotten for as low a price as ten cents, or perhaps even for nothing, in order to prevent starvation.

I will now enumerate the various documents, books and so forth brought by the alleged husband, evidently in an unguarded moment, to his own injury.

A coaching paper, marked Exhibit "1", gotten up for the purpose of coaching the alleged wife as to what she should give as the names of father, mother, grandfather, grandmother, and so forth, in order that they both may give the same names, it standing to reason that she should know the names of her own parents, without coaching, unless the object was as stated. This coaching paper also gives the date of her birth, which simple entry is what determines this coaching paper, in the form of a so-called marriage paper, to be fictitious; for the reason that the birth date was carelessly placed on a day that never existed, namely, the 30th day, 1st month, in the Kap Ng year (1894). Evidently the person who was fabricating this document did not even take the precaution to find out whether there was a 30th day in the 1st month of that year.

This coaching paper was wrapped in a piece of brown paper, marked Exhibit "2". On it is inscribed a number of Chinese characters, reading: "Please deliver the within contents to Quan Cheoy Quock" (alleged husband of applicant) "for him to coach Tsui Shee on; sent by Tsung Quock". This inscription indicates

that there is another Chinaman, in addition to the alleged husband, back of her importation.

Exhibit "3" is what might be called a quitclaim given by a Chinaman named Tso On in the case of a Chinese woman named Shun Gum, whom he evidently owned. Although the document is couched in language that would ordinarily indicate that it has reference to a loan, it actually has reference to a balance remaining unpaid by Shun Gum against her purchase price. This is indicated by the following words in the quitclaim: "In the event of Shun Gum making tens of thousands of dollars, becoming the mistress of her customers, all that shall be left with Shun Gum; it shall in no wise concern me. Tso On." This document, being in the custody of Quan Wy Chung, the alleged husband, would indicate that the ownership of Shun Gum has been transferred to him, he undoubtedly having paid the balance mentioned in the quitclaim, namely, \$600.00. This is borne out by the reported understanding among Chinese in Chinatown, San Francisco, that Shun Gum is the paramour or mistress of Quan Wy Chung; that she is a long time prostitute in San Francisco, serving white sailors and soldiers for the financial benefit of Quan Wy Chung. This document alone should condemn Quan Wy Chung as a man totally unworthy of the privilege of bringing a wife (so-called) into the United States.

A bill, Exhibit "4", containing references to transactions between this same Shun Gum and the firm of Quong Mow Yuen of Hongkong

gives further support to the indication that Quan Wy Chung is the owner of or the person controlling Shun Gum, from the fact that this bill, though referring entirely to transactions with Shun Gum, is presented to Quan Wy Chung for him to settle.

A little notebook, Exhibit "5", has an item referring to Shun Gum.

An envelope, Exhibit "6", has an inscription on it reading "the within are accounts of Auntie Tsoi Ngo." Tsoi Ngo is a notorious prostitute.

A paper memorandum, Exhibit "7", contains an entry: "Borrowed from Fung Ping \$30.00." And, alongside of it, an item reading: "Paid Jew Tsz Sik \$100.00." "Jew Tsz Sik" is the alias for Jew Loy Sing, the notorious high-binder referred to above.

Exhibit "8" is a memorandum book containing accounts referring to aiding and abetting the illegal landing of various Chinese. The book shows the people that co-operated with him in this, the principal man being the same Jew Loy Sing, and the prices for getting the Chinese into this country.

Exhibit "9" is his account book, with his name on it, referring to similar transactions to those recorded in Exhibit "8".

A paper memorandum, Exhibit "10", contains similar references.

Exhibit "11" has an item in it reading "Received of Suey Lin passage money, \$50.00."

“Suey Lin” is the name of a notorious Chinese prostitute.

Exhibit “12” is an account rendered to Quan Choey Quock, alleged husband, by Shung Chuck—full name Quan Shung Chuck—in which is an item reading “due from deposit for ‘guaranteed’ passage”, which is a Chinese term used for assisting Chinese to enter the United States fraudulently, the amount due being \$210.50.

Exhibit “13” is a letter addressed to Quan Choey Quock by a Chinaman signing his name as “Ing Fon”, stating that he had lately returned to Oakland. Ing Fon is one of the Chinese referred to in the accounts connected with the assisting of Chinese to enter the United States illegally mentioned above. The fact that Ing Fon can write from Oakland when the account referring to him shows he was in China proves that Quan Wy Chung was successful in steering him into the United States.

Exhibit “14” is a letter to Quan Choey Quock from “Chuck” in which the following language occurs: “You stated that the deposit of \$210.50 for guaranteed passage is correct.” This is the same phrase as that occurring in Exhibit “12”, and is the term generally used for assisting Chinese to enter the United States illegally.

Exhibit “15” is a letter written by Shung Tsun—full name Quan Choey Quock—the alleged husband, referring to a Chinaman whose true name was Him Quock, but who was evi-

dently returning to the United States under the false name of Quan Fook Sing (native, court record, 17 "Korea" September 27, 1905) (herewith), concerning whom the writer was apprehensive that his landing might be delayed or contested on the ground of his coming in under the false name. Quan Fook Sing, however, was landed for the reason that he had been adjudged a native of the United States by the District Court, and therefore, upon his return was forthwith admitted by this office. There is no doubt that Him Quock was so adjudged by competent authorities, but the letter shows the class of people the alleged husband and his friends belong to, that is, people whose business had reference to Chinese gaining admission into the United States under false names or through misrepresentations of one kind or another.

Exhibit "16" is a lengthy Chinese letter addressed to fifteen Chinese persons and sent by seven other Chinese persons from China with reference to a Chinese girl that was engaged to be married to a young Chinaman by the name of Ngon Hoy. This letter was written for the purpose of urging the father of Ngon Hoy, named Jew Sut Sing, to send his son back to China to marry the girl he was engaged to, for the reason that, according to Chinese customs, if a young man failed to claim his affianced within a certain time he forfeits the right to marry her, and her parents then marry her to another. It is evident from this lengthy letter and subsequent letters referring to the same subject

that Ngoy Hoy was illegally in the United States—doubtless smuggled into this country from Mexico or some other place. The father of Ngoy Hoy, when this urgent appeal reached him considered that Quan Cheoy Quock was the right person to go to to have papers “fixed up” for Ngoy Hoy to go to China and return.

In the letter marked Exhibit “17” this father writes: “I wish to inform you that my son, Ngoy Hoy, has been engaged in China ever since before he came to this country the first time, and that the girl to whom he is engaged is now about 30 years old, and recently the eldest gentry of our family” (meaning the more venerable members of their clan) “had a meeting with the gentry, elders, fathers and brothers of the bride’s family, and decided that by the 6th month my son must return and marry the girl, otherwise the engagement will be called off and we will have no further controversy about it.” Continuing, this father states that he would beg Cheoy Quock to use his best efforts to get a merchant’s paper for his son, Ngoy Hoy, so that he could return home to bring about the happy event desired; that he would pay all expenses for the “merchant’s paper”. (Ngoy Hoy was at that time working as a cook in and around San Francisco.)

Exhibit “18” is another letter from the father of Ngoy Hoy to Quan Cheoy Quock, the alleged husband, in which the following language occurs: “I have determined to get merchant’s papers for him, which would be the best plan. But do not apply for a native paper

for him, because at present native papers are hard for people to come and go on.”.

Exhibit “19” is one more letter from Ngon Hoy’s father to the applicant’s alleged husband, urging the latter to arrange at the earliest date to have Ngon Hoy go home. The writer also expresses the wish that the applicant’s alleged husband should consult with another Chinaman by the name of Gar Soon to have coaching paper prepared for him.

Exhibit “20” is another letter from Ngon Hoy’s father to Quan Choey Quock stating he had received word from Ngon Hoy’s mother in China to return home on the “Korea” the 3rd month, 20th day—which would be some time in 1905, April or May.

Exhibit “21” is a letter from the father of Ngon Hoy unintentionally giving this office a clue by which to locate the record concerning Ngon Hoy. With that clue I found that Quan Wy Chung succeeded better than the father of Ngon Hoy ever hoped for, as, from the papers located, Quan Wy Chung succeeded in bringing about his admission into the United States as a native thereof. The record of the case is entitled “Jew Hoy, 28 ‘Manchuria’ May 13th, 1906.” The testimony in this case as given by Ngon Hoy, whose full name is Jew Ngon Hoy, is to the effect that at that time he was a cook by occupation. Consequently he could not, then, go on merchant’s papers. It is also evident from this record that his claim to nativity was false, as he testified that he was never out of this country from the time of his birth, when

the correspondence in this case shows that he came to the United States from China after he had been engaged to be married to a Chinese girl there.

Exhibit "22" is a letter from the father of Ngon Hoy acknowledging his thanks to Quan Choey Quock for securing the admission of his son, whom he calls in this letter, however, his nephew Yun Hoy,—phonetically the same as Ngon Hoy.

After Quan Wy Chung was so successful in turning a native of China into a native of the United States two other Chinese were steered is as brothers of Ngon Hoy, and also as natives of the United States. The records in their cases are respectively Jew Wing, raw native, Number 28 "China", March 23rd, 1909, and Jew Thing, raw native, Number 7 "China" January 22nd, 1910. Shortly after these steerers succeeded in procuring the admission of Jew Thing, they continued their work by enabling younger Chinese to come to the United States as his sons, one being named Jew Fook (son of native, 96 "Manchuria" August 28th, 1909), the other Jew Quong Tai (son of native, 194 "Manchuria" November 12th, 1909).

Unfortunately for the ends of justice, Jew Hoy went to China and returned and was admitted as late as April 22nd 1914, returning as a prior landed native ex "Manchuria" (13376/7-25).

Here is a batch of five Chinese, all unlawfully in the United States—gotten in through

the agency of Quan Wy Chung, the alleged husband of Tsui Shee. This number has reference only to those who have already been admitted; there are others mentioned in these records who would have the same right to come as the five, except for this expose'—the total, what with wives and daughters and sons, being possibly as many as a score or more. The papers relating to the five mentioned are herewith transmitted for your inspection.

One of the memorandum books found in the possession of the alleged husband of Tsui Shee has a reference to a Chinaman who was to be gotten into the country under the false name of Jew See Song. From the data given in said account book I was able to locate the record in that case which is entitled Jew She Song, son of native, San Francisco, 85 "China" June 8th, 1909. His admission was secured as the son of Jew Fook, who was able to secure admission for himself some years before as a native (3852 "Siberia" May 27th, 1904). This man, Jew Fook, was made the father of three other boys, namely, Jew Shee Fong, (139 "Mongolia" November 27th, 1908); Jew She Fun, (Number 1 "Manchuria" March 29th, 1909); and Jew See Wy (65 "Siberia" October 28th, 1909). He failed to secure admission of one (Jew See Wy). Papers in these cases herewith.

These are merely specimen cases that I have found bearing on the fraudulent transactions of the alleged husband of Tsui Shee. Doubtless if we had more time the other entries referring

to such transactions could be run down and the records could be found.

From the discrepancies in the testimony of Tsui Shee's case and that of her alleged son, and this mass of incriminating evidence, I join Inspector McCall in his adverse recommendation as to both cases.

(Signed) Jno. Endicott Gardner,
Chinese Inspector and Interpreter.

The anonymous letter to which the attention of the Immigration officials was directed, is found on page 81 of said original record of the Bureau of Immigration.

In this case, like the other immigration cases recently considered on appeal by this court, there is a stipulation to the effect that all of the records of the Bureau of Immigration are to be considered a part of the Transcript on appeal. This stipulation is found on page 108 of the Transcript of Record.

During the early hearings in this case, appellants were represented by entirely different counsel from counsel representing them at the present time.

An examination of the record will show that the principal question urged before present counsel took charge of the case, was cured when the record was again presented to them so that the order of deportation could be made by the Secretary or acting Secretary of Labor in accordance with the views of

Judge Dooling. Since this was properly done, as is shown on page 151 of the said original record of the Bureau of Immigration, the government is at a loss to understand just what objections are being presented at the present time. It is true that counsel calls attention to certain papers and evidence being submitted without giving counsel proper opportunity to examine the same, but counsel fails to call attention to what this evidence was that was submitted. An examination of pages six and seven of Respondent's "Ex. D" on file herein will show conclusively that such was not the case.

In the case of *Chin Hing vs. White* recently decided in this court, found in 234 Fed. 616, a similar question was presented to the court that now appears for determination in this case. In that case the decision supports the contention of the government in this case.

It is a well recognized fact in the immigration law that unless the proceedings of the immigration officers are manifestly unfair, or their action is such as to prevent a fair investigation, the proceedings taken by them cannot be disturbed.

Low Wah Suey vs. Baccus, 225 U. S. 460

And their findings are final and conclusive.

Ekin vs. U. S. 142 U. S. 651

Lee Lung vs. Patterson, 186 U. S. 170

Zakonaite vs. Wolf, 226 U. S. 272

A review of the record in this case fails to show any unfairness on the part of the immigration officials in conducting their hearings in this case. For that reason, the order of deportation of the Secretary of Labor and the holding of the lower court should be sustained.

Respectfully,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

Attorneys for Appellee.

12
No. 2784

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TSUIE SHEE et al.,

Appellants,

VS.

SAMUEL W. BACKUS,
as Commissioner, etc.,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

JOSEPH P. FALLON,

Hearst Building, San Francisco,

*Attorney for Appellant
and Petitioner.*

Filed

Filed this.....day of August, 1917. AUG 15 1917

F. D. Monckton,

FRANK D. MONCKTON, Clerk.

Clerk.

By.....Deputy Clerk.

No. 2784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

TSUIE SHEE et al.,

Appellants,

VS.

SAMUEL W. BACKUS,
as Commissioner, etc.,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions that the decision of the Court herein be set aside and that a rehearing of the cause be granted.

The grounds for the application are:

First. That the unfairness manifested by the immigration officials in incorporating into the record on appeal to the Secretary of Labor, papers relative to other cases and which had nothing to

do with the appellant's case, which was never presented to the detained or her counsel, and which was manifestly incorporated for the purpose of prejudicing her case before the Secretary of Labor, seems not to have been fully considered by the Court.

Second. That the Court in considering that there was "some evidence" and sufficient to sustain the judgment of the lower Court evidently failed to note that the introduction of these papers, without giving the detained an opportunity of meeting them, precluded a fair and impartial hearing.

UNFAIRNESS.

The papers referred to are the records of the cases of Quan Kay, Chan Ngan Yuk and Quan Soo who arrived at the port of San Francisco about the same time as did the applicant.

We contend that the finding of papers in trunks and the introduction of reports of investigators should not carry any weight as evidence whatever, unless the papers were first presented to the detained or her counsel. In the instant case they were not so presented. It is the principle of allowing evidence to go into the record on appeal to the Secretary of Labor which is not presented to the detained's counsel that we are contending against. Unless this right is upheld no applicant can expect a fair and impartial hearing before the Department of Labor.

“Rule 5, Subdivision 1 of the Rules governing the Admission of Chinese is as follows:

If your conclusion of the hearing conducted in accordance with Rule 3 the officer in charge does not conclude that the applicant is admissible, counsel employed by the applicant or in his behalf shall be permitted to examine the record formulated at the hearing, and may be loaned a copy of the transcript of testimony contained therein. * * * The word ‘record’ as used in this paragraph shall not be construed to include memoranda of comment or letters of transmittal, unless they contain evidence additional to that in the record proper.”

The papers referred to did contain evidence and were put there for the express purpose of prejudicing the appellant’s case in the mind of the Secretary of Labor. It is not for the Court to determine just how much weight the said papers carried, or whether they carried any weight detrimental to the applicant in the mind of the Secretary of Labor; it is enough that they did contain some evidence and that they were presented to him without the detained or counsel being given an opportunity to reply.

For the foregoing reasons we earnestly and respectfully urge the Court to grant the petition for a rehearing.

Dated, San Francisco,

August 13, 1917.

Respectfully submitted,

JOSEPH P. FALLON,

*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL. .

I hereby certify that I am of counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

JOSEPH P. FALLON,
*Counsel for Appellant
and Petitioner.*

11

No. 2792

United States
Circuit Court of Appeals
For the Ninth Circuit.

POMONA FRUIT GROWERS EXCHANGE, a
Corporation,

Appellant,

vs.

FRED STEBLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

MAR 25 1911

F. D. THOMPSON,

No. 2792

United States
Circuit Court of Appeals

For the Ninth Circuit.

POMONA FRUIT GROWERS EXCHANGE, a
Corporation,

Appellant,

vs.

FRED STEBLER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

N. A. ACKER, Esq., Foxcroft Building, 68 Post
Street, San Francisco, California.

For Appellee:

FREDERICK S. LYON, Esq., 504-7 Merchants
Trust Building, Los Angeles, California.

Citation [on Appeal].

[3*]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Fred Stebler,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered and of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, in suit in equity No. A-44 therein, and wherein you are the complainant and appellee and Pomona Fruit Growers Exchange is defendant and appellant, to show cause, if any there be, why the decree of said court made and entered therein dismissing plaintiff's Bill of Complaint and adjudging that you recover of said appellant and defendant the sum of \$36.20, should not be corrected,

*Page-number appearing at foot of page of original certified Record.

and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, Southern Division this 21 day of January, 1916.

[Seal]

OSCAR A. TRIPPET,
United States District Judge.

Due service of a copy of the above citation is hereby acknowledged this 21st day of January, 1916.

FREDERICK S. LYON,
Solicitor for Complainant and Appellee. [4]

[Endorsed]: No. A-44—Eq. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant and Appellee vs. Pomona Fruit Growers Exchange, Defendant and Appellant. Citation. Filed Feb. 4, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [5]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. A-44—EQUITY.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant. [6]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,

Defendant,

AND

FRED STEBLER,

In Cases Nos. A-43, 45, 49, 50, 51,

Complainant,

52, 53, 54, 55, 56,

vs.

57 58, 62, 63, 64,

65, 66, 67, 70, 71,

SUNDRY DEFEND-

73, 74, 75, 76, 77,

ANTS.

78, 86, 90, A-8

No. Division and

Cir. Ct. No. 1675.

Motion to Dismiss.

To the Honorable, the Judges of the Above-entitled
Court:

Come now the defendants to the above-mentioned
suits pending in this court, and through their attorney—N. A. Acker, Esq., move this Honorable Court
that an order be granted dismissing each and every
of the above-mentioned suits, with costs to the
defendants.

The grounds assigned for said motion and the
granting of an order for dismissal with costs to the
defendants are:

1. That the above-entitled suits are for the in-
fringement [7] of Re-issue Letters Patent No.
12,297, particularly claims 1 and 10 thereof, by the
use of Fruit Grading Machines, involved in Equity

suit No. 1562, entitled Fred Stebler vs. Riverside Heights Orange Growers Association and George D. Parker.

2. That all of the machines involved in the above-mentioned suits for infringement of said letters Patent are machines which were purchased from George D. Parker, one of the defendants to Equity suit No. 1562, pending in this court and entitled Fred Stebler vs. Riverside Heights Orange Growers Association and George D. Parker, the said George D. Parker, being the manufacturer and seller of the said alleged infringing machines.

3. That an accounting and final decree have been had in said Equity suit No. 1562 and under the said accounting therein the said George D. Parker accounted for each and every of the Fruit Graders involved in each of the above-mentioned suits for infringement, pending against these defendants herein.

4. That under said accounting full damages and profits for each and every of the said infringing machines manufactured and sold by the said George D. Parker to the defendant users herein were awarded unto the said Fred Stebler, complainant, to said Equity suit No. 1562 and complainant, to each of the above-entitled [8] suits, and the judgment for said damages and profits has been satisfied by the said George D. Parker, in said suit No. 1562, and satisfaction entered of record.

5. That under the decision of this Court, rendered by his Honor, Olin Wellborn, and entered Feby. 18, 1914, *re* Equity suit No. 1562, the satisfac-

tion of judgment awarded against defendants to said Equity suit, No. 1562, releases the infringing machines involved herein and gives unto the users, the defendants herein, free right to the use of said machines without payment of further tribute to the patent monopoly or to the owner of the letter patent, the complainant herein.

6. That said decision of his Honor, Olin Wellborn, on an appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order granted under and in conformity with such decision, was sustained by the said United States Circuit Court for the Ninth Circuit, as more fully appears in the decision of said Court, 214 Fed. Rep. 550.

7. That no necessity, legal or otherwise, existed prior to the accounting against the defendants to said Equity suit No. 1562 for the institution of suit against the defendants to the above-mentioned pending suits, which defendants comprised mere users of the infringing [9] machines manufactured and sold by the said George D. Parker—one of the defendants to Equity Suit No. 1562.

8. That no machine is involved in any of the above-mentioned suits which has not been accounted for by the said George D. Parker and included in the judgment of this Court for damages and profits, which judgment, as above stated, has been satisfied by the said George D. Parker.

Wherefore an order for the dismissal of each and

every of the above-mentioned suits with costs to the defendants is prayed for.

Respectfully submitted,

N. A. ACKER,

Solicitor for Defendants.

San Francisco, California, November 13, 1915.

[Endorsed]: No. A-44. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, and Sundry Defendants. Motion to Dismiss. Filed Nov. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [10]

[Minutes of Court—November 29, 1915.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-ninth day of November, in the year of Our Lord, one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. A-44—EQUITY.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

This cause coming on this day to be heard on defendant's motion that this suit, together with other suits by the same complainant against various defendants, be dismissed, with costs to the defendants in said suits; Frederick S. Lyon, Esq., appearing as counsel for complainant; N. A. Acker, Esq., appearing as counsel for defendant; and said motion having been argued, in support thereof, by N. A. Acker, Esq., of counsel for defendant; and Court, at the hour of 12 o'clock M., having taken a recess until the hour of 2 o'clock, P. M., of this day; and now, at the hour of 2 o'clock P. M., Court having reconvened; and counsel being present as before; and said motion having been further argued, in support thereof, by N. A. Acker, Esq., of counsel for defendant, and in opposition thereto by Frederick S. Lyon, Esq., of counsel for complainant, and in support thereof in reply by N. A. Acker, Esq., of counsel for defendant; and this cause having been submitted to the Court for its consideration and decision on defendant's said motion to dismiss; it is now by the court ordered that defendant's said motion to dismiss this suit, with costs against complainant, be, and the same hereby is denied; and it is further ordered by the Court, on motion of Frederick S. Lyon, Esq., of counsel for complainant, that [11] the Bill of Complaint herein be dismissed, with costs against defendant, a decree accordingly to be prepared and submitted by counsel for complainant. [12]

[Decree of Dismissal.]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

It is hereby ordered, adjudged and decreed that Complainant's Bill of Complaint in the above-entitled suit be and the same is hereby dismissed, and that complainant recover of and have judgment against defendant for the sum of thirty-six & 20/100 dollars, complainant's costs and disbursements herein.

OSCAR A. TRIPPET,
District Judge.

Dated Los Angeles, California, December 6, 1915.

Decree entered and recorded Dec. 6, 1915.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Leslie S. Colyer,
Deputy.

[Endorsed]: No. A-44—Eq. United States District Court, Southern District of California, Southern Division. Fred Stebler vs. Pomona Fruit Growers Exchange. Decree. Filed Dec. 6, 1915. Wm.

M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal. [13]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

Statement of Proceedings.

For the purpose of an appeal on behalf of defendant to the United States Circuit Court of Appeals for the Ninth Circuit, the following constitutes a stipulated record in narrative form of the proceedings had and taken in the above-entitled suit in the above-entitled court:

On July 16th, 1913, complainant filed his Bill of Complaint, alleging the infringement by defendant of re-issue letters patent Number 12,297 and particularly claims 1 and 10 thereof, owned by complainant.

Defendant answered denying the validity of said letters patent alleging anticipation by prior patents, etc.; and denying infringement.

On November 25th, 1913, complainant moved for a preliminary injunction.

On May 24th, 1910, complainant filed a Bill of

Complaint against Riverside Heights Orange Growers Association and George D. Parker, in Equity suit number 1562. Defendants duly answered therein and upon final hearing on September 17, [14] 1912, decree was entered dismissing complainant's Bill of Complaint in suit 1562; thereafter complainant appealed from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, the proceedings on which appeal are hereby referred to and by reference made a part hereof, the same being entitled Fred Stebler, Appellant, vs. Riverside Heights Orange Growers Association and George D. Parker, Appellees, number 2232 in said United States Circuit Court of Appeals, which court announced its opinion reversing said decree of dismissal; that within thirty days of the announcing of said opinion, appellees applied to said United States Circuit Court of Appeals for the Ninth Circuit to stay its mandate for a sufficient time to enable appellees to present a petition to the Supreme Court of the United States for a Writ of Certiorari, and upon such application said Court ordered that its mandate be stayed until the Supreme Court of the United States had acted upon such petition, upon appellees executing a bond for \$5,000; upon the denial of said Writ by said Supreme Court the mandate of said United States Circuit Court of Appeals for the Ninth Circuit was issued and filed in the trial court and upon November 5th, 1913, this court made and entered its interlocutory decree vacating its decree of dismissal and adjudging that said re-issue patent 12,297 and claims

1 and 10 thereof were valid, owned by complainant, and had been infringed by said George D. Parker and said Riverside Heights Orange Growers Association, the defendants in said Equity suit 1562; and referred said suit 1562 to a Special Master to take an account of the profits, gains and advantages arising from said infringement and granting a perpetual injunction against said defendants. [15]

That on November 25th, 1913, defendants, George D. Parker and Riverside Heights Orange Growers Association, made a motion in said Equity suit number 1562 in this court to enjoin complainant from the prosecution of this suit number A-44 and others; that said motion was granted by this Court; that complainant Fred Stebler appealed from the granting of such injunction to the United States Circuit Court of Appeals for the Ninth Circuit, the record and proceedings upon such appeal being made part hereof by reference, and being entitled in said United States Circuit Court of Appeals for the Ninth Circuit, Fred Stebler, Complainant, vs. Riverside Heights Orange Growers Association and George D. Parker, Defendants, number 2394, the opinion and decision of said United States Circuit Court of Appeals for the Ninth Circuit on said appeal 2394 being reported in 214 Fed. Rep. 550.

That thereafter in said Equity suit number 1562, complainant proceeded to an accounting before the Master appointed therein and after due proceedings had upon the accounting before said Master, the Master rendered his report to this court recommend-

ing and finding that complainant in said suit 1562 have and recover from defendant, George D. Parker, \$5,232.85 as gains and profits realized by the said George D. Parker from the manufacture and sale of machines in infringement of said patent, including the machines purchased by this defendant, Pomona Fruit Growers Exchange, from said George D. Parker, as well as including the other users referred to in Appeal 2394, and recommending and adjudging that complainant recover in said suit 1562 against George D. Parker the sum of \$6,237.35 as damages, such damages also including the said machines of defendant Pomona Fruit Growers Exchange and the [16] other user, defendants referred to in said appeal number 2394; that upon due proceedings had said Master's report was confirmed by this court and judgment entered accordingly.

That said judgment for said profits and damages and the costs in said suit number 1562 were and have been fully paid and satisfied by defendants, George D. Parker and Riverside Heights Orange Growers Association.

That on November 29, 1915, defendant in this suit number A-44, moved that this suit be dismissed at the cost and expense of complainant, and made a similar motion in the other suits against the user defendants referred to in such motions, upon the records and proceedings had in said suit number 1562 and upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit on said appeal number 2394. At the hearing of said motions, complainant opposed defendants' motion and

moved that said suit number A-44 and all the others referred to in said appeal number 2394 be dismissed at the cost and expense of the defendants therein; on November 29th, 1915, this Court denied defendants' motion and granted complainant's motion dismissing this suit number A-44 and dismissing each of the suits against the user defendants referred to in appeal number 2394 at the cost and expense of the respective defendants therein, and the decree of dismissal in this suit number A-44 ordered, adjudged and decreed that complainant recover of defendant, Pomona Fruit Growers Exchange, the sum of \$36.20 and the decrees in the other suits against the user defendants referred to in Appeal number 2394 adjudged that complainant have judgment against said respective defendants for various sums of costs and disbursements. [17]

[Stipulation Re Statement of Proceedings, etc.]

The foregoing is stipulated and approved by the counsel for the respective parties as a statement of all the proceedings had or taken in this court in connection with the motion for dismissal of said suit and an agreed record upon which the said appeal of the defendant Pomona Fruit Growers Exchange shall be heard in the United States Circuit Court of Appeals for the Ninth Circuit from said judgment for costs and disbursements.

FREDERICK S. LYON,
Attorney for Complainant.
N. A. ACKER,
Attorney for Defendant.

[Endorsed]: No. A-44. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, Defendant. In Equity. Statement of Proceedings. Filed Jan. 26, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [18]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS' EXCHANGE,
Defendant.

Petition for Order Allowing Appeal.

The defendant to the above-entitled suit, conceiving himself aggrieved by the final order and judgment made and entered by said Court in the above-entitled cause, on the 6th day of December, 1915, allowing costs to the complainant, upon the dismissal of the above-entitled suit, on motion of the complainant thereto, comes now, by his counsel, and petitions said Court for an order allowing him to prosecute an appeal from said order and judgment granting and allowing said costs to the complainant, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf

made and provided, and also that an order be made fixing the sum of security which the defendant shall give and furnish upon such appeal, said security to act as a supersedeas bond, pending the determination of the said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

N. A. ACKER, [19]

Solicitor and Counsel for Defendant.

[Endorsed]: In Equity. No. A-44. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, Defendant. Petition for Order Allowing Appeal. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [20]

*In the United States District Court, Southern
District of California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

Assignment of Errors.

Comes now the defendant to the above-entitled suit, and specifies and assigns the following as the errors upon which it will rely upon its appeal to the

United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and order entered in the above-entitled suit on the 6th day of December, 1915, awarding unto plaintiff costs, on the granting of the complainant's motion to dismiss said above-entitled suit.

That said District Court of the United States in and for the Southern District of California, Southern Division, erred as follows:

I.

That the Court erred in denying defendant's motion to dismiss the above-entitled suit.

II.

That the Court erred in not allowing costs to the defendant, upon the dismissal of the bill, on complainant's motion to dismiss. [21]

III.

That the Court erred in granting complainant's motion to dismiss the above-entitled suit, with costs unto the complainant.

IV.

That the Court erred in allowing unto the complainant a solicitor's fee of Twenty (20) Dollars in the above-entitled suit as a part of the costs therein, as taxed by the clerk of said court.

All of which is respectfully submitted.

N. A. ACKER,

Solicitor and Counsel for Defendant.

[Endorsed]: In Equity. No. A-44. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs.

Pomona Fruit Growers Exchange, Defendant. Assignment of Errors. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [22]

[Order Allowing Appeal and Fixing Amount of Bond.]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

Order Allowing an Appeal at a stated term, to wit, the July term, A. D. 1915, of the United States District Court, Southern District of California, Southern Division, held at the courtroom of the said court in the city of Los Angeles, county of Los Angeles, on the 6th day of December, 1915. Present: Hon. OSCAR A. TRIPPET, United States District Judge for the Southern District of California, Southern Division, sitting in Equity.

On motion of Nicholas A. Acker, Esq., solicitor and of counsel for defendant in the above-entitled suit,—

IT IS ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as prayed for in the petition for order allowing appeal from the final judgment and order heretofore filed and entered, dismissing the above-entitled suit, on motion of complainant herein, be and the same is hereby granted.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250.00) [23] the same to act as a supersedeas bond, and also as a bond for costs and damages on said appeal, and that on the filing of said bond all proceedings herein be stayed until the determination of the appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

OSCAR A. TRIPPET,
District Judge.

Dated January 20, 1916.

[Endorsed]: In Equity—No. A-44. U. S. District Court, Southern District of California, Southern Division.. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, Defendant. Order. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [24]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That the United States Fidelity & Guaranty Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Fred Stebler, plaintiff in the above-entitled suit, in the penal sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said Fred Stebler, his heirs, assigns and legal representatives, for which payment, well and truly to be made, the United States Fidelity & Guaranty Company of Maryland, binds itself, its successors, and assigns, firmly by these presents.

Sealed with corporate seal and dated this eleventh day of January, 1916.

The condition of the above obligation is such that whereas the defendant to the above-entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to re-

verse the final order or decree made, rendered and entered on the 6th day of December, 1915, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled suit by [25] the said Court allowing costs to the plaintiff on the granting of plaintiff's motion for a dismissal of said above-entitled suit.

NOW, THEREFORE, the condition of the above obligation is such that if the defendant to the above-entitled suit shall prosecute his said appeal to effect and answer all costs which may be adjudged against him if he fails to make good his appeal, this obligation shall be void; otherwise to remain in full force and effect.

[Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By VAN R. KELSEY,

Its Attorney in Fact.

Approved 1/20/16.

TRIPPET,

Judge.

State of California.

County of Los Angeles.—ss.

On this 11th day of January, in the year one thousand nine hundred and sixteen, before me, Hallie D. Winebrenner, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey, known to me to be the duly authorized attorney in fact of the United States Fidelity and Guaranty

Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Van R. Kelsey duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed [26] my official seal the day and year in this Certificate first above written.

[Seal] HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State
of California.

[Endorsed]: In Equity—No. A-44. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Pomona Fruit Growers Exchange, Defendant. Bond on Appeal. Filed Jan. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [27]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern
District of California.*

Clerk's Office.

IN EQUITY—No. A-44.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,

Defendant.

Praecipe [for Transcript of Record.]

To the Clerk of said Court:

Sir: Please prepare as a transcript of record on the appeal in this suit by defendant from the final order or decree of the Court, a copy of each of the following, and duly certify the same as the Transcript on Appeal, in accordance with the Equity Rules of the Supreme Court:

1. Motion to dismiss.
2. Minute record of the clerk relative to the denial of defendant's motion; motion of complainant to dismiss, and the granting of complainant's motion.
3. Final order or decree of court.
4. Petition for order allowing appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Bond on appeal for cost in the sum of \$250.00.
8. Stipulated statement of proceedings.

N. A. ACKER,

Solicitor for Defendant. [28]

Received a copy and acknowledging due service of above Praeipe this 7th day of February, 1916.

FREDERICK S. LYON,

Solr. for Complt.

[Endorsed]: No. A-44. U. S. District Court, Southern District of California, Southern Division. Fred Stebler vs. Pomona Fruit Growers Exchange. Praeipe for Transcript on Appeal. Filed Feb. 12, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [29]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. A-44—EQ.

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS EXCHANGE,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing twenty-nine typewritten pages, numbered from 1 to 29, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Motion to Dismiss, Minute Order of November 29, 1915, Decree of Dismissal with costs against defend-

ant, Statement of Proceedings, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal and Praecipe for Transcript on Appeal in the above and therein entitled action, and that the same together constitute the record on appeal as specified in the said Praecipe for Transcript on Appeal filed in my office on behalf of the appellant by his solicitor of record.

I do further certify that the cost of the foregoing record is \$12.30, the amount whereof has been paid me by Pomona Fruit Growers Exchange, the appellant in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United [30] States of America, in and for the Southern District of California, Southern Division, this 19th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled April 19, 1916. L. S. C.] [31]

[Endorsed]: No. 2792. United States Circuit Court of Appeals for the Ninth Circuit. Pomona Fruit Growers Exchange, a Corporation, Appellant,

vs. Fred Stebler, Appellee. Transcript of Record.
Upon Appeal from the United States District Court
for the Southern District of California, Southern
Division.

Filed May 4, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

Paul P. O'Brien,
Deputy Clerk.

**[Order Enlarging Time to File Record and Docket
Cause to April 29, 1916.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

POMONA FRUIT GROWERS EXCHANGE,
Appellant,

vs.

FRED STEBLER,

Appellee.

Good cause appearing therefor, it is hereby
ordered, that the time heretofore allowed said appel-
lant to docket said cause and file the record thereof,
with the clerk of the United States Circuit Court of
Appeals for the Ninth Circuit, be and the same is
hereby enlarged and extended to and including the
29th day of April, 1916.

Dated at Los Angeles, California, February 19th,
1916.

TRIPPET,
U. S. District Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Pomona Fruit Growers Exchange, Appellant, vs. Fred Stebler, Appellee. Order Extending Time to File Record. Filed Feb. 26, 1916. F. D. Monckton, Clerk.

[Order Enlarging Time to File Record and Docket Cause to July 1, 1916.]

United States Circuit Court of Appeals, for the Ninth Circuit.

(No. A-44—EQ. S. D.)

POMONA FRUIT GROWERS EXCHANGE,
Appellant,

vs.

FRED STEBLER,

Appellee.

Good cause appearing therefor, it is hereby ordered that the time within which appellant in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 1st day of July, 1916.

Los Angeles, 3/28, 1916.

TRIPPET,
District Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Pomona Fruit Growers Exchange, Appellant, vs. Fred Stebler, Appellee. Order Extending Time to Docket Cause and File Record. Apr. 3, 1916. F. D. Monckton, Clerk.

No. 2792. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to July 1, 1916, to File Record Thereof and to Docket Case. Refiled May 4, 1916. F. D. Monckton, Clerk.

No. 2792

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POMONA FRUIT GROWERS'
EXCHANGE,

Defendant, Appellant,

vs.

FRED STEBLER,

Complainant, Appellee.

APPELLANT'S BRIEF

N. A. ACKER,

Solicitor for Appellant

Filed

SEP 25 1916

F. D. Anderson

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

POMONA FRUIT GROWERS'
EXCHANGE,

Defendant, Appellant,

vs.

FRED STEBLER,

Complainant, Appellee.

In Equity
No. 2792

BRIEF OF APPELLANT
POMONA FRUIT GROWERS EXCHANGE.

This case comes before this Court on an Appeal from the Final Decree made and entered in the above entitled suit on the 6th day of December, 1915, by the District Court of the United States for the Southern District of California, Southern Division, and by which decree the above entitled suit and thirty companion suits were dismissed on motion of Complainant, and with costs to the Complainant in each of said cases.

For an understanding of the issues involved herein, it is deemed advisable to give a brief history

of the litigation up to the time of the entry of the final decree, more especially so, as there is involved herein thirty other companion cases in which final decrees have been entered dismissing the bills and awarding costs to the Complainant, and which cases, under agreement between the parties, are to abide by the decision of this Court rendered in connection with the present appeal.

The present appeal is the outgrowth of Equity Suit No. 1562, Stebler vs. Riverside Heights Orange Growers Association and George D. Parker, for infringement of United States Reissue Letters Patent No. 12297, granted Robert Strain under date of December 27, 1904, for an improved Fruit Grader, said Letters Patent having been duly assigned to Complainant. The Bill of Complaint in said action was filed on the 24th day of May, 1910. Answer was duly filed, testimony taken and final hearing had before His Honor, Olin Wellborn, and decision rendered holding non-infringement of claims 1 and 10 (the same being the only claims involved), and decree entered dismissing the bill.

The Complainant to said action thereupon perfected an appeal to this Court, which appeal was duly heard and decision rendered reversing the decision of the lower Court. This decision is reported in 205 Fed. p. 735.

Thereafter, and before a reference was had to the Master for an accounting, the Complainant to said action—Fred Stebler, appellee herein, filed in the District Court for the Southern District of California, Southern Division, thirty-one suits (of which

the foregoing is one) against sundry defendant users of the infringing machines manufactured and sold by George D. Parker, one of the defendants to said Equity suit No. 1562, and threats were made as to the institution of a number of additional suits against other users of the infringing machines manufactured and sold by said George D. Parker.

After the filing of said thirty-one suits, motion was made by defendant, George D. Parker, to Equity suit No. 1562, for an order restraining the prosecution of said suits so filed against the users and for an injunction against the filing of additional threatened suits against other vendee users of the machines manufactured and sold by the said George D. Parker. This motion was duly heard, and an order made by His Honor, Olin Wellborn, restraining the prosecution of said suits, and enjoining the filing or commencement of additional suits against the customers of the said George D. Parker.

Thereafter, an appeal was taken to this Honorable Court from the order so made by the lower Court, and, after hearing, this Court rendered its decision sustaining the decision of the lower Court. This decision is reported in 214 Fed. p. 550.

Thereafter a reference to a Master was had, and an accounting taken in said suit No. 1562, and the Master rendered his report to the Court, under date of September 29th, 1915, as to the number of infringing machines manufactured and sold by the defendant—George D. Parker, and recommending the damages and profits payable by the said George D. Parker unto the Complainant, Fred Stebler. Under said accounting, the Master found the dam-

ages and profits payable by the said George D. Parker for all the infringing machines sold to and used by the vendees thereof, including the Appellant herein, and equally so those sold to and used by the defendants to the other thirty suits filed by said Fred Stebler against the vendee users of the infringing machines.

Upon due proceeding had, the Master's report was confirmed by the Court and judgment entered accordingly.

The judgment for said profits, damages and the costs in said suit No. 1562 was duly satisfied and fully paid by said defendant, George D. Parker.

After the satisfaction and full payment of all profits, damages and the costs as above set forth, and before any proceedings were had in connection with the present appeal case, the defendant to this suit, and the defendants to each of the other thirty pending suits, on the 29th day of November, 1915, by a motion entitled—

FRED STEBLER,

Complainant,

vs.

POMONA FRUIT GROWERS
EXCHANGE,

Defendant,

and

FRED STEBLER,

Complainant,

vs.

SUNDRY DEFENDANTS.

In cases Nos. A-43,
45, 49, 50, 51, 52,
53, 54, 55, 56, 57,
58, 62, 63, 64, 65,
66, 67, 70, 71, 73,
74, 75, 76, 77, 78,
86, 90, A-8, No.
Division and Cir.
Ct. No. 1675.

moved for a dismissal of the above suits, and each of them, with costs to the Defendants.

This motion was duly heard by His Honor, Oscar A. Trippet, on the 29th day of November, 1915, and the motion for an order dismissing the said suits with costs to the Defendants, was denied.

After the denial of said motion of Defendants, the Complainant voluntarily asked for the granting of an order dismissing the said thirty-one suits, and each thereof, with costs to Complainant, which order the Court then and there granted, and final decrees entered and recorded Dec. 6th, 1915.

Defendants' motion for order of dismissal of suits with costs to defendants, appears on page 3 of the record.

Minute order of Court denying motion of Defendants and granting motion of Complainant for dismissal of suits with costs to Complainant, appears on record p. 6.

Final Decree, record p. 8.

Stipulated statement of proceedings, record p. 9.

Assignment of Errors, record p. 15.

ARGUMENT.

The motion of Defendants for dismissal of the pending thirty-one suits, with costs to the defendants, was based on the ground that no matter was pending before the Court for determination relative to the question of infringement and validity of patent, inasmuch as in the main suit No. 1562, an ac-

counting had been had, and full recovery of damages, profits and costs made, for the machines involved in each of said suits, and on the further ground that no necessity, legal or otherwise, existed prior to the accounting, against the defendants to Equity Suit No. 1562 for the institution of suit against the defendant vendee herein and the vendee defendants to the thirty other suits involved in the said motion for dismissal. In other words, the filing of said suits was a needless act, inasmuch as complainant had full knowledge that the machines used by the various vendee defendants were machines purchased from the manufacturer, George D. Parker, one of the defendants to Equity Suit No. 1562; and at the time of the filing of said suits, the complainant, Fred Stebler, Appellee herein, was fully advised by the decision of this Court, that the said machines manufactured and sold by the said George D. Parker to the vendee users constituted an infringement of Reissue Letters Patent No. 12297, such knowledge being gained through the decision of this Court, 205 Fed. 735. Complainant had also the further knowledge that the said George D. Parker, one of the defendants to Equity Suit No. 1562, was amply able to respond to all damages, profits and cost which the Court might award, based on the Master's report on accounting, and equally so Complainant to said actions knew that the said George D. Parker had undertaken to hold harmless the purchasing users of his machines. With such knowledge on the part of the Complainant at the time of the filing of the said thirty-one suits against the vendee users of the Parker machines, only one

reason existed for the filing of this large number of suits after an adjudication of infringement against the manufacturer of said machines and prior to an accounting, which reason could only be a desire to annoy, embarrass and harass a competitor in business.

After the decree in Equity Suit No. 1562, the matter was referred to a Master of the Court, to ascertain and report to the Court the amount of such damages, and also the amount of such gains, profits and advantages, and, as stated, under such accounting all profits and damages for the machines previously adjudged to be an infringement and involved in the thirty-one suits subsequently filed by Appellee herein, and embraced in the Defendant's denied motion to dismiss with costs, would have been accounted for and were so accounted for by the manufacturer, Parker, one of the defendants to Equity Suit No. 1562.

This Court, in its decision, 214 Fed. 550, sustaining the decision of the lower Court restraining the prosecution of these thirty-one suits, and enjoining the filing of additional suits, held that these infringing machines, in the possession of purchasing users, were free of the monopoly of the patent, on the manufacturing infringer thereof settling with the Complainant for full damages and profits. Such being the case, no reason existed for the institution of said suits until the manufacturing infringer had been given an opportunity to respond under an accounting.

As stated by this Court in its decision, 214 Fed. p. 553, "To permit the plaintiff, under such circum-

stances, to institute and maintain suits against vendees of the defendant, to whom the infringing machines have passed, would, it is obvious, be harassing, annoying and expensive.”

On page 554 of the reported decision, the following language is used, “a decree against the defendants for the profits which they received by reason of the sale of the infringing machines, together with whatever damages the plaintiff may have suffered by reason thereof, must be held to vest the right to the use of the machines in the defendants’ vendees free from any further claim by the patentee.”

It is thus clear from the decision of this Court, that the thirty-one suits against the vendees of the manufacturer (of whom the appellant is one) against whom suit for infringement was at such time pending, should never have been instituted or filed. Such being the case, said suit instituted against appellant, and equally so the other thirty suits instituted against the vendees of the manufacturer prior to the accounting, should have been dismissed on motion of the defendants after the judgment for profits, damages and cost had been satisfied by the manufacturing infringer, and which satisfaction was made prior to the filing of the motion on behalf of appellant and the other thirty defendants for dismissal of the thirty-one pending suits instituted against the said vendees of the infringing manufacturer, one of the defendants to Equity Suit No. 1562.

In the present case the motion made on behalf of defendant appellant herein and equally so on behalf of the defendants to the other thirty pending suits

for dismissal with costs to the defendants, was not only denied, but a similar motion on behalf of the complainant to said suits, for dismissal with costs to the complainant, was granted, and a final decree entered in this case and each of the other thirty suits based on the granting of said motion and adjudging as to this appellant "that Complainant recover of and have judgment against Defendant for the sum of Thirty-six and 20/100 Dollars, Complainant's costs and disbursements herein."

A portion of these costs and disbursements consists of the sum of \$20, Solicitor's docket fee, and the same sum as Solicitor's fee was allowed as a portion of the costs and disbursements provided for in each final decree entered in the other thirty dismissed suits. Objection was made to the allowance of costs to the Complainant, not only in argument before the lower Court, but equally so before the Clerk against the inclusion in the taxation of costs of a Solicitor's docket fee of twenty dollars.

Our second assignment of error is directed to the granting of Complainant's motion to dismiss the suits, with costs to Complainant, and the third assignment of error is to the allowance unto Complainant, as a portion of costs of a Solicitor's fee of Twenty (20) Dollars.

Although the decision of this Court in Case No. 2394—214 Fed. 550, expressly states that the plaintiff, under the circumstances herein set forth and known to the plaintiff at the time of instituting suits, should not be permitted to institute and maintain suits against the customers of the defendant

manufacturer, we nevertheless find herein the appellant penalized for the Complainant Appellee doing that which he should not have done and, additionally, called upon to contribute to the financial account of the Complainant's solicitor to the extent of \$20.00—solicitor's docket fee. In the case at issue the amount is small, viz. \$36.20, but when consideration is given to the fact that thirty-one suits were involved in the motion of dismissal and thirty of which abide the decision of this appeal, we find the defendants called upon to contribute to the solicitor alone the sum of 31×20 or \$620.00 as solicitor's docket fee, and additionally to the Complainant the sum of \$551.25, representing costs, exclusive of the solicitor's docket fee; for in the present appeal case said costs, exclusive of solicitor's docket fee amounts to \$16.20 and in the other said thirty cases involved in Defendant-Appellant's denied motion for dismissal and Complainant-Appellee's granted motion of dismissal with costs, the costs are as follows:

Case A-43, \$16.75; A-45, \$15.10; A-49, \$17.10; A-50, \$17.75; A-51, \$19.20; A-52, \$19.60; A-53, \$15.20; A-54, \$17.70; A-55, \$17.70; A-56, \$19.20; A-57, \$16.10; A-58, \$19.75; A-62, \$18.10; A-63, \$13.20; A-64, \$17.40; A-65, \$17.40; A-66, \$16.30; A-67, \$19.75; A-70, \$16.20; A-71, \$17.10; A-73, \$17.10; A-74, \$17.10; A-75, \$19.65; A-76, \$19.65; A-77, \$39.20; A-78, \$19.75; A-86, \$16.20; A-90, \$19.00; A-8, \$15.20; and No. 1675, \$26.00. A total sum of \$551.25, exclusive of the solicitor's docket fee of \$20 allowed in each case.

It is this sum of money, \$551.25, plus the sum of \$620.00 solicitor's docket fees, or a total of \$1171.25, which the defendants to said dismissed suits are called upon to pay under the final decrees entered; not as costs of litigation, but for the Complainant doing a needless act, an act which this Court stated in its decision in the case of Riverside Heights Orange Growers Association, et al, supra, should not be permitted, and which amount is to be paid by the manufacturer-infringer in addition to the damages, profits and costs heretofore paid.

In defendant-appellant's motion for dismissal, record p. 3, the above mentioned cases were made a part thereof, and that these are the cases referred and which were involved in appeal case 2394 of this Court—Riverside Heights Orange Growers Association, et al, supra (division reported 214 Fed. 550), see stipulated Statement of Proceedings, record p. 9, last paragraph of p. 12.

It is these cases which this Court held should not have been instituted, and sustained the injunctive order of the lower Court against the institution of additional suits of like character against the users of the infringer manufacturers' machines.

If under the decision of this Court, suits should not be permitted to be instituted against the vendee of a defendant manufacturer against whom suit is pending, it is difficult to understand upon what sound reasoning defendant vendees and through the vendees the manufacturer infringer should be penalized when such suits are instituted.

Here we find thirty-one such suits were instituted, and the attorney for the Complainant, if the lower Court's decision is sustained, is to be enriched thereby to the extent of \$620.00 for the doing of a needless act and the doing of that which this Court has stated should not be permitted.

To sustain the decision of the lower Court in the present case is to establish that which appeals to the cupidity of practitioners, for it would sanction the filing of suit for infringement against an infringing manufacturer, and after decision of infringement obtained and reference to a Master being had, to institute innumerable suits against infringing vendee users of the manufacturer defendant, and at a later date and after settlement for profits and damages by the infringing manufacturer for the machines in the possession and use of his vendees, to collect from each defendant vendee a solicitor's docket fee of \$20 besides costs. Here we have thirty-one of such filed suits, the solicitor's docket fees amounting to \$620. In another case there may be involved suits against 200 such vendees, in which case the solicitor for the Complainant would receive as docket fees alone the sum of \$4000.

We do not believe equity sanctions any such procedure.

Here, the above case and each of the thirty other cases embraced in Defendant-Appellant's motion for dismissal and which were involved in appeal case No. 2394 of this Court, after the denial of defendant's motion for the dismissal of this and each of the said thirty cases referred to in the motion for

dismissal, was voluntarily dismissed by the Complainant, there being at the time of such voluntary motion for dismissal no question open for final hearing. Thus, no final hearing was ever had. It being a voluntary dismissal of a suit, and of a series of co-pending suits, which under the decision of this Court rendered in connection with appeal case No. 2394 should not have been instituted, no costs should have been allowed unto the Complainant; but, on the contrary, costs should have been allowed unto the Defendant-Appellant for the unnecessary expense to which it had been placed relative to a needless act of the Complainant.

We believe our third assignment of error is well founded in law and should be allowed.

Inasmuch as Complainant voluntarily dismissed the above appealed case, and each of the co-pending thirty companion cases embraced in Defendant's motion for dismissal, no solicitor's docket fee should have been allowed. The dismissal was a voluntary act of the party Complainant.

Sec. 924 of the Revised Statute provides "On a trial before a jury, in civil or criminal causes, or before references or on a final hearing in equity or admiralty, a docket fee of twenty dollars."

There having been no final hearing of the present appealed case (for a voluntary dismissal can not be treated as a final hearing), there should not have been granted an allowance of a solicitor's docket fee of Twenty dollars. To constitute a final hearing in equity within the meaning of section 824 of the Re-

vised Statutes, there must be a hearing of the cause on its merits.

No docket fee is taxable in a suit in equity voluntarily discontinued by the complainant.

Consolidated Burying Apparatus Co. vs.
American Process Fermentation Co., 24
Fed. 658.

Yale Lock Manufacturing Co. vs. Colvin, 14
Fed. 269.

We submit that our fourth assignment of error is well founded in law and should be allowed.

Inasmuch as under the decision of this Court in Appeal Case No. 2394, Stebler vs. Arlington Heights Orange Growers Association, et al., supra, suit against this Appellant and the Defendants to the companion suits embraced in Defendant-Appellant's motion for dismissal and involved in said Appeal Case No. 2394, should not have been instituted, the lower Court should have granted Defendant-Appellant's motion for dismissal.

We, therefore, submit that our first assignment of error is well founded and should be allowed.

As this suit and its companion thirty suits should not have been instituted in accordance with the decision of this Court, *re* Appeal Case No. 2394, it follows that the Defendant-Appellant and the De-

fendants to the said thirty companion suits should not be penalized by being required to pay unto Complainant his costs for the doing of said needless acts, to-wit, for the institution of suits which this Court stated should not have been instituted and upheld the injunctive order prohibiting the institution of additional suits of a like character.

We submit that our second assignment of error is well founded and should be allowed.

It is submitted that the penalizing of the Defendant-Appellant herein and the Defendants to the companion thirty suits for acts of the Complainant needlessly done, is a plain abuse of discretion, and we submit that under the circumstances of this case, the lower Court was not warranted in refusing to grant the Defendant's motion for dismissal of the present case and the said companion thirty cases embraced in said motion.

Respectfully submitted,

N. A. ACKER,

Solicitor and Counsel for Appellant.

No. 2792.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Pomona Fruit Growers, Exchange,

Defendant-Appellant,

vs.

Fred Stebler,

Complainant-Appellee.

APPELLEE'S BRIEF.

FREDERICK S. LYON,
504 Merchants Trust Building,
Los Angeles, California,
Solicitor for Appellee.

Filed

Oct. 2 - 1916

F. D. Monckton

No. 2792.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Pomona Fruit Growers, Exchange,

Defendant-Appellant,

vs.

Fred Stebler,

Complainant-Appellee.

APPELLEE'S BRIEF.

This is an appeal from a final decree. It is clear from the assignments of error that appellant does not seek review of any part of the decree or of any proceeding had in the case, except that portion of the decree which adjudges that appellant shall pay the costs.

At the threshold we meet the appellant with the proposition that this appeal must be dismissed, as it is a well-settled rule of law that an appeal or a writ of error will not lie to review a decree relating to costs alone. This rule is well settled. It has been applied by the Supreme Court of the United States in several cases.

“So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. The decree against him *will*, consequently, *not be considered*. *Canter v. Ins. Co.*, 3 Pet. 307; *Elastic Fabric Co. v. Smith*, 100 U. S. 110.”

Paper Bag Machine Cases, 105 U. S. 766.

In the case of *Gamewell Fire Alarm Co. v. Municipal Signal Co.*, 77 Fed. 490, the Circuit Court of Appeals for the First Circuit dismissed the appeal, which involved only the question of costs in a suit for infringement of patent, citing *Elastic Fabric Co. v. Smith* and *Paper Bag Cases* (*supra*) as their authority.

In *in re Michigan Central Railroad Co.*, 124 Fed. 724, the Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Lurton, Severens and Richards) sustained the appeal in that case on the ground that the decree complained of involved the construction and application of a statute regarding the allowance of certain fees to the clerk of court and (page 732) that the decree appealed from did not involve any question of taxation of costs as between the parties, and that costs as between the parties are within the sound legal discretion of the trial court, and for that reason an appeal will not lie alone from a decree taxing costs, citing *Canter v. Insurance Co.*, 3 Peters 306; *U. S. v. Brig Malik Adhel*, 2 How. 209; *Elastic Fabric Co. v. Smith*, 100 U. S. 110; *DuBois v. Kirk*, 158 U. S. 58, 67; *Kittredge v. Race*, 92 U. S. 116, 120; *Paper Bag Cases*, 105 U. S. 766, 772; *Gamewell Fire Alarm Tel. Co. v. Municipal Co.*, 77 Fed. 490.

Street on Equity Practice, Sec. 2059, page 1223, says:

“The ground upon which the right of appeal is denied upon the question of costs alone is that the matter is one of discretion, and not of positive law.”

“In equity and admiralty the matter of the imposition of costs upon the one party or the other is so far a matter within the sound legal discretion of the court of first instance, that a decree relating to costs alone will not ordinarily be reviewed in the appellate court.”

Street Fed. Eq. Pr., Vol. 2, Sec. 2058, page 1222.

This court (Circuit Judges Gilbert and Ross and District Judge Hawley), in *Tyler Mining Co. v. Sweeny*, 78 Fed. 277, 282, says:

“The law is well settled that an appeal or writ of error does not lie from a judgment or decree as to costs merely. *Canter v. Insurance Co.*, 3 Pet. 307, 319; *Fabrics Co. v. Smith*, 100 U. S. 110; *Wood v. Weimar*, 104 U. S. 786, 792; *Russell v. Farley*, 105 U. S. 433, 437; *Machine Co. v. Nixon*, *id.* 766, 772; *Bank v. Hunter*, 152 U. S. 512, 516, 14 Sup. Ct. 675; *DuBois v. Kirk*, 158 U. S. 58, 68, 15 Sup. Ct. 729; *Clarke v. Warehouse Co.*, 10 C. C. A. 387, 62 Fed. 328, 334.”

It is submitted, therefore, that the appeal should be dismissed with costs to appellee.

This appeal does not involve any question of law as to whether a given item of costs or disbursements taxed was allowable or taxable, or whether any portion

of the cost judgment appealed from is admissible or allowable under any statute of the United States. There is before the court no question except the bare, naked challenge of the discretion of the court in adjudging that the costs be paid by the appellant. Appellant's fourth assignment of error finds no foundation in the record.

So far as the record before this court shows there was a judgment in gross for \$36.20, complainant's costs and disbursements [Record page 8]. Nowhere does it appear in the record of what items this sum is composed. So far as this court can determine this whole amount may be fees of the clerk of the District Court and fees of the U. S. marshal for serving the papers. That any "solicitor's docket fee" of \$20.00 is included is not shown by the record. There can be no assumption of such fact by this court. On the record as presented there is nothing before this court embracing any controversy as to such "solicitor's docket fee," and all of appellant's contentions and assertions in regard thereto are *dehors* the record.

It is well established law that no appeal lies to this court from the taxation of the costs by the clerk of the court. Such an appeal must be first taken from the action of the clerk to the judge of the District Court, otherwise appeal is waived. The stipulation of facts contained in the record does not show that there was any appeal taken from the clerk's taxation. As a matter of fact there was no appeal taken from the clerk's taxation of the costs. Hence, this appeal to this

court must be dismissed. See decision of this court in Tyler Mining Co. v. Sweeny, 79 F. 277, 281-282.

In this last case the court says:

“This court cannot review the action of the clerk of the Circuit Court. Under the practice prescribed by the rules, the taxation of costs as made by the clerk becomes final unless an appeal is taken therefrom to the court or judge within the time mentioned in rule 19.”

The rules of the District Court of the United States for the Southern District of California provide that the action of the clerk in taxing costs shall be final unless modified on appeal as provided in rule 19. Rule 19 provides that an appeal, from the decision of the clerk in the taxation of costs, may be taken to the court or judge, orally * * * or by motion to retax * * *. It is therefore submitted that there is no question before this court as to the correctness or propriety of taxing the solicitor's docket fee of \$20.00, which forms the subject-matter of appellant's fourth assignment of error. This allegation of error is in no manner before the court.

There is another reason why the assignments of error does not bring before this court any question for review. It does not appear that appellant appealed, from the taxation of cost by the clerk, to the District Court. It is submitted that the failure to so appeal leaves out a necessary link in the procedure, necessary as a foundation for a review. Without thus contesting the correctness of the taxation and the entry of the cost judgment by the clerk, appellant calls upon

this court, without submitting the matter to the District Court, to review the taxation. It is urged that it was necessary for appellant to have appealed from the clerk's taxation and carried this procedure through the District Court and from there to this court, in order to have a reviewable question. In other words that this appeal seeks review solely of the clerk's action in taxing costs. If such action is to be reviewed, it must be reviewed in the manner prescribed by law and the rules of the court. If no appeal from the clerk's taxation is taken, then there was no action of the District Court upon which to base the appeal. Appellant has mistaken its remedy (granting he had one),—in that it was a prerequisite to appeal to this court, that an appeal should be taken from the clerk's taxation to the District Court, and from the action of that court to this court.

Tyler Min. Co. v. Sweeny (*supra*).

By this appeal the court is called upon to review the exercise by the District Judge of his discretion in determining whether this suit should be dismissed without costs or which party should pay the costs. All the facts of the litigation were before the District Court. Not only was this suit, and all the records thereof before him, but all the records in the litigation between the present appellee, Fred Stebler, and George D. Parker, were before him and referred to in the consideration of the question thus to be determined. They were the records of that court.

It was clearly shown that at the time of the com-

mencement of this suit there was no defense to the cause of action sued on, and none was pleaded in the answer. A motion for preliminary injunction was made, and when brought on to be heard, after argument by counsel, determination thereof was stayed, upon the defendant George D. Parker in Case No. 1562 giving an additional bond in the sum of \$10,000.00 to cover the entire claim which appellee had or might have against this appellant. By order of this court this stay was limited to the date of entry of judgment in Case 1562 on the accounting. This limit was part of the modification ordered by this court in its opinion (114 Fed. 550).

Upon the entry and payment of judgment in suit 1562 the use of appellant's machines *became licensed by operation of law* by virtue of the decision of this court in 114 Federal 550. No right or license to use the machines existed in appellant prior to that time, and appellant was using appellee's property without even color of right.

The theory of this court and of the District Court in staying this suit, upon the defendant George D. Parker giving bond in suit 1562 to pay all profits and damages, was that *when so paid* these machines *would be freed*. The lower court required a \$10,000 bond in addition to the \$5,000 theretofore given by George D. Parker (to secure all profits and damages) when a stay of the mandate of this court was desired to permit a petition to the Supreme Court for a writ of certiorari. At that time this appellee (appellant in this court in that case, 205 Fed. 735) made a showing in

open court as to the questionable responsibility of George D. Parker. On such showing the \$5,000 was required.

The District Court did not grant the injunction staying prosecution of this case as a matter of right. It granted it only upon condition that George D. Parker give security that the machines of the present appellant *would be freed or licensed* by actual payment. Neither the District Court nor this court ever decided *that when this suit was instituted* appellant had any defense to it. It was stayed and its prosecution enjoined solely on the theory that security having been given that a full license *would be acquired*, the suit should not go on until that license was available as a defense. When it became available as a defense the District Court having all the facts and circumstances before it adjudged that, as appellant admitted, by its pleading it at the time the suit was brought, appellant had no defense, and was wrongfully using appellee's property. It would be inequitable to mulct the owner of the patent appellant had wilfully infringed with the costs. Appellant and not appellee was the one who violated the rights of the other and appellant has been amply protected in having this suit held in abeyance while through the process of the law after full litigation and hearing and subsequent payment a *license* covering both the past and future use of appellant's machines came into *esse*.

In order to have availed itself of this license as a defense, appellant would have been required to plead it as matter happening *after the suit had been insti-*

tuted. It did not exist at the time appellant filed its answer. In order to save expense all the records and proceedings in the suit No. 1562 of this appellee against George D. Parker and the Riverside Heights Orange Growers' Association were informally brought before the District Court on appellee's motion to dismiss. Appellant's counsel at the hearing admitted to the District Court that at the time this suit was filed appellee had a right to file it,—had a good cause of action against appellant,—and that at that time appellant had no defense.

On the other hand, at such hearing appellee conceded that appellant could then plead the payment of the judgment in 1562 (under the decision of this court in 214 Fed. 550) as a defense of a license acquired by operation of law after this suit was filed. As the real controversy was settled, motions by each party were made to dismiss,—the only question being who should pay the costs. After careful review of all the facts and a consideration of the decisions of this court (205 Fed. 735 and 214 Fed. 550) the District Court denied appellant's motion to dismiss at appellee's cost and granted appellee's motion to dismiss *at appellant's cost*.

Had such hearing not been had informally, it would have been necessary for appellant to have secured leave to file a supplemental answer to plead a license acquired after the suit was commenced. It would also have been necessary for it in such supplemental answer to aver that its machines were among those accounted for and paid for in case 1562, two years after this suit was filed. Leave to file such supplemental answer

doubtless would have been on condition that appellant pay all costs to that date.

Appellant stood an infringer for two years. Its infringement was settled by payment after this suit was brought. Before the prosecution of this suit was even stayed, a bond was exacted to ensure such payment. Appellant made this situation by its wilful infringement. Appellee could not prevent such infringement. Appellant was not even ensured his money *until* the bond was given as required by the District Court as a condition of staying the prosecution of this suit. Had George D. Parker not given that bond, neither the District Court nor this court would have stayed the prosecution of this suit. Why, therefore, can it be said that the District Court abused its discretion in ordering appellant to pay the costs which by appellant's acts were rendered necessary? Must appellee be mulcted because he asked merely security that a part of what was his (so determined by this court) should be paid him?

Had George D. Parker in case 1562 not paid the judgment therein in full no license or release would have inured to this appellant and this suit would have proceeded to trial *without appellant* having any defense whatever.

Is not the test,—Was there a cause of action at the time of filing the suit? If there was a cause of action at that time, must not the defendant pay the costs to the date when such defense comes into *esse* in order to be permitted to plead a defense acquired subsequent to its original answer?

Appellee is not suing to make "costs" or expense, and appellee's solicitor is not practicing law for "costs," and it cannot be denied that it was the bringing of this suit (to which no defense then existed) that resulted in the District Court requiring security be given so that appellant would not go empty-handed and this wilful infringement go unredressed. Had appellee made costs or expenses after ample security had been given the question would have different equities.

After the bonds had been given no irreparable injury could have been inflicted on appellee by the continuation of appellant's infringement. That wrongful act of infringing was the cause of this suit. Such infringement was being continued by appellant although this court had finally determined appellant's acts to be an infringement. Appellant should not complain because the costs of securing appellee from loss due to appellant's wrongful act are charged against it.

The injunction order (214 Fed. 550) was to protect both parties. It was to hold matters in *statu quo*,—by securing appellee by bond against loss and appellant by stay of this suit until such time as payment could be made *and a right to use the infringing machines secured* and prevent any collection "in a double proportion" (214 Fed. 554). In this latter decision this court did not find that appellee had no right to bring this suit. The court only enjoined the bringing of other suits *because* appellee had been protected from loss by bonds. This was solely the interposition of equity to protect *both* parties. It is true that in this court on the appeal from the order granting this in-

junction there was no question of the financial responsibility of Mr. Parker. That question was then out of the case due to the giving of the bonds.

To have refused appellee recovery of the costs incurred in bringing this suit to protect his established rights would be to deny him recourse to the courts against wrongdoers. It was absolutely necessary that this suit be filed. That it resulted in a party, a stranger to the suit, in giving security to hold the appellee harmless from the acts complained of in this suit, and then in the further staying of the suit, shows that the necessity existed. The very fact that such bonds were required by the court is alone a sufficient admission that not only was this suit rightly commenced but that unless appellant or some one on its behalf changed conditions, the suit would have been and must have been prosecuted. It was therefore appellant's unlawful act that caused these costs. It should pay them. It has had the full benefit. It has secured a license to use the machines and a discharge from all claim for past use,—not by any agreement of appellee,—not by any real license or consent by appellee but by operation of law, and this license did not exist at the time this suit was brought.

FREDERICK S. LYON,

Solicitor for Appellee.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POMONA FRUIT GROWERS'
EXCHANGE,

Appellant,

VS.

FRED STEBLER,

Appellee.

} Appeal Case
No. 2792

**Reply Brief to Appellee's
Memorandum Brief**

N. A. ACKER,

Counsel for Appellant

Filed

OCT 27 1916

F. D. Monckton

Clerk

IN THE
United States Circuit Court of Appeals
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POMONA FRUIT GROWERS'
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vs.

FRED STEBLER,

Appellee.

No. 2792

APPELLANT'S REPLY BRIEF.

By permission of the Court, we present herewith reply to the memorandum brief filed by the Appellee since the oral argument of the above appeal case and companion appeal case No. 2793.

Counsel for Appellee now relies on the recently decided case of the *American Caramel Co. vs. White*, 234 Fed. 328-334, to support the contention that costs should be allowed appellee in connection with the dismissed cases involved in the present appeals. However, counsel has failed to note the distinction existing between said reported case and the appealed cases under submission.

American Caramel Co. vs. White, supra, presents a case wherein full proofs were taken and final hearing had thereon and decision rendered on the testimony presented relative to the question of infringement and validity of the letters patent. The lower court held the claims of the letters patent in suit invalid and dismissed the bill of complaint. On appeal, the decision of the lower court was reversed. Pending decision on appeal the letters patent expired, but such expiration of the said letters patent did not take away the right of recovery as to the profits and damages which had accrued, if any, during the infringing period. Inasmuch as at the time of the commencement of the suit the Complainant was entitled to an injunction on the establishment of validity of the letters patent and infringement, equity had jurisdiction of the case and on final decree complainant was entitled to costs of suit, together with recovery of profits and damages under an accounting to be had. Even had an accounting been waived, complainant was entitled to cost of suit after final hearing.

In the case of *American Caramel Co. vs. White* the failure to recover damages and profits was not occasioned by a *voluntary dismissal* of the suit, neither was the allowance of costs based on a *voluntary dismissal*. On the contrary, there was no voluntary dismissal of suit, for there was a final hearing on full proofs taken, an appeal, decision holding validity of the letters patent and infringement thereof. However, the proofs failed to support the allegations of the bill as to the patented article

having been marked with the words "Patented," together with the date of the letters patent as alleged in the Bill of Complaint, and on Petition for Modification of Decree, it was held that due to such lack of proof an accounting was unnecessary and, as the letters patent had expired *pendente lite*, the Bill of Complaint was dismissed. Such dismissal did not deprive complainant of its right to recover costs of suit.

In said case costs were not allowed merely because the complainant's right to an injunction had been sustained, for the injunctive feature was only incidental to equity jurisdiction. The use of the expression "right to an injunction" in the decision of said case, was simply expressive of the fact that where a final hearing had been had and defendant to said suit held to have infringed, and complainant entitled to an injunction, costs, and what other relief it is entitled to, should follow. Every essential requisite to the determination of a patent controversy was present, the absence of a recovery being solely due to the failure by proof to support the allegation of the Bill of Complaint as to the marking of the article with words "Patented" together with the date and year of the letters patent, which failure of proof was fatal to a recovery as to damages and profits, in the absence of proof as to other notice to the defendant.

In the present appeal cases there were no final hearings, the Bills of Complaint were voluntarily dismissed by the complainant, and against the protest of defendant that they be dismissed on motions

of Complainant, and furthermore no necessity existed for the filing of said Bills of Complaint.

The cases involved herein differ in every essential from the case of *American Caramel Co. vs. White*, and we fail to find in the decision of said cited case any expression sustaining the contention of the appellee herein.

In printed brief on file herein, and in the oral argument, counsel for appellee stated that we admitted in the lower Court the right of complainant to file the Bills of Complaint. Evidently, counsel must have misunderstood what was stated to the lower Court, for it has always been our position that these suits and the companion forty-two suits should not have been permitted to be filed, and we so contended before this Court in connection with appeal case No. 2394, and equally so in connection with the present appeals.

Counsel for appellee has been unable to cite a single decision wherein costs have been allowed on a *voluntary* dismissal of the Bill of Complaint by the Complainant, even where the bill was filed against an infringing manufacturer. To allow costs under the circumstances presented in our appeal, would be inequitable and result in penalizing the defendant for an unnecessary act wilfully done by the complainant.

Respectfully submitted,

N. A. ACKER,

Solicitor and Counsel for Appellant.

